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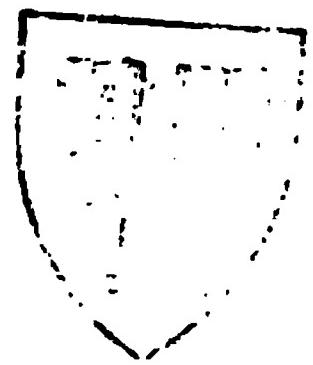
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PRACTICE REPORTS

IN THE

SUPREME COURT

AND

COURT OF APPEALS,

OF THE

STATE OF NEW YORK.

BY NATHAN HOWARD, JR.,
COUNSELLOR-AT-LAW, NEW YORK.

VOLUME XXXIV.

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PRACTICE REPORTS.

SUPREME COURT.

JULIUS C. SAGE agt. ANTHONY C. HARPENDING.

The statute of 1849, in reference to appeals from proceedings before a justice of the peace to the county court, in *summary proceedings*, providing for a *stay of the issuing of a warrant*, pending the appeal, does not apply to proceedings instituted against a tenant solely on the ground that he is *holding over after the expiration of his term*. It is otherwise as to proceedings against the tenant in the other three classes of cases mentioned in the Revised Statutes.

The *appeal of itself* in such case, does not stay the power of the justice to issue the warrant against the tenant to enforce his judgment.

The fact that an appeal has been taken to another court, does not affect the *conclusive nature of the judgment as a bar*, while it remains unreversed.

Where the landlord, the owner in fee of the demised premises, claims that the term of the tenant has expired, enters without process and without force, during the temporary absence of the tenant, he is justified in using so much force as is necessary to defend himself and maintain his possession of the premises.

Seventh District General Term, June, 1867.

J. C. SMITH, E. DARWIN SMITH and JOHNSON, *Justices.*

Action for assault and battery.

Defense, 1. A general denial. 2. That at the time of the alleged assault, the defendant was the owner and in possession of certain real estate, consisting of a store in the town of Starkey, Yates county, and the alleged assault was committed in defense of his possession, and to prevent great bodily harm being done him by the plaintiff, who with the assistance of divers persons armed with axes, &c., wrongfully entered to expel the defendant. 3. *Son assault demesne.*

On the trial at the Yates circuit, in March, 1866, the following facts were proved: The defendant, Harpending, was the owner of a block of buildings in the village of Dundee, known as Harpending's block. On the 7th April, 1865, and for about two years next preceding that date, Sage, the plain-

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tiff, was in possession of certain rooms in said block, as tenant of the defendant, under a lease. On the 7th April, 1865, Harpending instituted summary proceedings before a justice of the peace, under the statute, to remove Sage, on the ground that he was holding over after the expiration of his term, without the permission of his landlord; alleging that the term of the lease expired on the 1st April, 1865.

Sage appeared in the proceedings, and made an affidavit admitting his tenancy, and his occupation of the premises, but denying that his term had expired, and alleging that by the terms of the agreement between him and Harpending, his term would not expire till the 1st April, 1866.

The issue thus joined, was tried before the justice on the 13th April, 1865, who on the same day gave judgment in favor of Harpending, for the immediate possession of the premises, and his costs.

On the same day, and before a warrant was issued, Sage perfected an appeal from said judgment to the Yates county court, and on such appeal put in an undertaking, executed by a sufficient surety, conditioned, as required by law, to make such appeal effectual, and also conditioned that the tenant would pay all rent accruing or to accrue upon the premises described in the landlord's affidavit in said proceedings, subsequent to the application made by said landlord to the justice to remove the tenant.

After the appeal was perfected and the undertaking was put in, and on the 15th April, 1865, the justice, at the request of Harpending, issued his warrant of dispossession against Sage. After the appeal, and before the issuing of the warrant, it had become a question of discussion between the counsel of the respective parties, in the presence of Harpending, whether the justice had any right to issue his warrant after the appeal was perfected and the undertaking was put in.

On Saturday, the 15th April, about five o'clock in the afternoon, while Sage was absent, the sheriff, with the warrant, and without force or violence, put Harpending into the

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possession of the premises, with the understanding that Sage's personal property was to remain there undisturbed until Monday morning, at nine o'clock.

As soon as Harpending got possession, he fastened the building securely, so that no one could enter it without breaking in, and on Sunday he commenced taking down partitions erected by Sage. On that day Sage went to the building and called upon Harpending to open the door, but he refused. Sage then broke into the building through a window sash. Other persons acted in concert with him, one of whom used an axe to effect an entrance.

The testimony tended to show that while Sage was at the window, Harpending showed him a pistol, and told him he must not come in, and that as soon as Sage broke through the window, he went towards Harpending as fast as he could. When he was about five feet from Harpending, the latter fired upon him with the pistol, and hit him in his left breast. Sage was protected by his clothing and the contents of his vest pocket, so that the skin was not broken, but he received a bruise upon the breast. As soon as the pistol was fired, Sage sprang upon Harpending, and took hold of him. Harpending struck Sage on the head with the pistol, and drew blood, but soon after the pistol was taken from him, and, as the testimony tended to show, he was overpowered and compelled to surrender the possession of the premises to Sage.

The action was brought for the personal injury sustained by Sage, and he recovered a verdict for \$300.

On the trial, the judge ruled that unless the defendant could show that the warrant was legally issued, upon a proper judgment, and proceedings had for the purpose of dispossessing the plaintiff, the defendant was not justified in holding possession of the premises.

He also ruled that the appeal removed the proceedings from the justice to the county court, and the justice had no right to issue the warrant after the notice of the appeal was served on him, and that the warrant was void.

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He also charged the jury that the appeal and bond given, and the proceedings had by the plaintiff, operated as a stay of proceedings, so that the justice had no right to issue the warrant; that the warrant was void, and that the defendant was not rightfully in possession.

He also charged that the defendant was a trespasser in taking possession of the building, and the plaintiff had a legal right to break into the building, and the defendant was guilty of a wrong in resisting the plaintiff in getting in.

The counsel for the defendant excepted to these several rulings, and requested the judge to charge the jury that if the defendant had possession in fact, he was justified in using violence, if necessary, to defend his possession. The court declined so to charge, but charged that the defendant was a mere trespasser, who had but recently entered, and the plaintiff had the right, if compelled to do so, to use force to eject the defendant.

The defendant's counsel also requested the court to charge that the judgment before the justice between the parties was *res adjudicata*, and settled the rights of the parties, and that the plaintiff was holding over his term, but the court declined, and charged that the judgment ceased to be *res adjudicata* after the appeal was perfected with the security.

The defendant's counsel also requested the court to charge that the plaintiff cannot recover in this action, except on the ground that excessive violence was used by the defendant in defending his possession; but the court declined, and charged that it was not so in this case.

The defendant's counsel also requested the court to charge that from the undisputed facts of the case, the plaintiff is not entitled to recover against the defendant, for the reason that all the force he used was insufficient to maintain his possession, but he was overpowered and compelled to surrender the same; but the court declined so to charge, or to charge on that point otherwise than he had already done.

The counsel for the defendant excepted to the several

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refusals to charge, and the several instructions above stated, and the court ordered a stay of proceedings on the verdict, and that the exceptions be heard at the general term in the first instance.

CHARLES S. BAKER, for defendant.

I. The court erred in declining to hold and rule as requested by the defendant, that the defendant was in possession under color of title and authority, and under the warrant, and the plaintiff had no right to forcibly eject him, or retake the possession of the premises from the defendant. There being a dispute between the parties, the defendant claimed to be the owner, and the plaintiff's time for which he had leased them had expired, and he having, without force, obtained possession of them, and the plaintiff, although claiming that his term for which he had leased the premises had not yet expired, and also that the bond, appeal and proceedings, stayed proceedings: Yet he would not be justified in using force to obtain the possession of the premises, and the defendant had a right to use sufficient force to keep possession of the same. And the exception taken thereto is well founded.

(a.) In one aspect of the case, this proposition involves the right of the plaintiff's recovery therein. There can be no dispute about the facts embraced within it, and the court is only called upon to fix the rule of law applicable thereto.

(b.) We confidently hope that we shall be able to convince the court of the correctness of the proposition. And it is, we believe, due to the learned justice, before whom this cause was tried, to state here, that he entertained serious doubts of the correctness of the rule laid down by him.

(1.) The defendant was the owner of the building, and in the actual occupancy and possession thereof, and claimed the right to hold the same as such owner, because the plaintiff's term of tenancy had expired. The plaintiff claimed his term had not expired. The only dispute that existed, was as to who had the right of possession. Apparently, and in fact, if the plaintiff's term had expired, the defendant, at the time of the alleged assault, was clothed with an absolute and complete title. He was the owner of the fee which carries with it the right of property, and in the actual occupancy and possession of the premises, which three matters establish a perfect title. (*Kent's Com.* 5th ed. vol. 4, p. 372.)

(2.) The defendant having thus proved himself in possession of his own premises, the question was fairly presented, whether he had the right, or would be justified in using force to maintain and defend possession of his property against the plaintiff, who claimed simply a right to the possession thereof under a lease, which the defendant claimed had expired. The court held that to entitle the defendant to defend his possession, he must go further and show that he was in possession, under legal process, issued upon a proper judgment and proceedings had for that purpose.

(3.) The court, by its rulings, made the defendant's right to hold his property to depend entirely upon his manner of getting possession thereof, which we confidently submit was entirely immaterial, only so far as to prove that actual violence or force was not used towards the plaintiff or persons representing him. How the defendant got into possession of his property, was entirely immaterial so far as this action is concerned, with the qualification that he did not use force or violence towards the plaintiff in so doing.

(4.) The court, by its ruling, changed the *onus* of proof, by compelling the defend-

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ant to show that in the taking of the possession of his property, he took it under valid process, &c. It ought not to be the law, that I being in the possession of my own property, can be compelled to show how I came by it, as against any person who shall, with force and violence, undertake to eject me therefrom, claiming that he has a right to such possession.

The rule is well settled, that if the plaintiff had brought an action of trespass for a forcible entry, even, on the part of the defendant, he could not have maintained the action, and it is entirely immaterial how possession is obtained. (*Samson agt. Henry*, 13 *Pickering*, 36; *Grenville agt. College of Physicians*, 12 *Modern Rep.* 386, *Opin. HOLT, Ch. J.* 387; *Crowther agt. Ramsbottom*, 7 *Term*, 654, *Lord KENYON, Ch. J.* 657, 658; *Opin. LAWRENCE, J.* 658; *Hyatt agt. Wood*, 4 *Johns.* 150.)

In the case of *Samson agt. Henry*, the court held that it was entirely immaterial how or for what purpose the defendant entered the premises.

(5.) But it is not necessary to discuss the question last presented, as it will be examined in another branch of our argument. It is sufficient that the question raised will not necessarily have to be examined by the court, as the rule of law applicable to the facts of this case is such that in no event is the plaintiff entitled to recover.

(6.) Conceding everything to the plaintiff, it will not be questioned that there was a dispute about the facts in regard to who was rightfully entitled to the possession of the premises, and that the plaintiff was actually in possession thereof, claiming the right to hold them as the owner; alleging the defendant's lease had expired. It is perfectly clear, both upon principle and authority, that the plaintiff had no right under such circumstances, to undertake by force and violence to oust the defendant from the possession of his property, and the defendant would be justified in using sufficient force to prevent it. (*Parsons agt. Brown*, 15 *Barb. S. C.* 590; *Jackson agt. Stansberry*, 9 *Wend.* 201; *Opin. NELSON, J.* 202; 3 *Black. Com.* 4, 5, 179; *Newkirk agt. Sabler*, 9 *Barb. S. C.* 652; *Opin. PARKER, J.* 656; *Samson agt. Henry*, 11 *Pickering*, 379; *Opin. WILDE, J.* 387.)

(7.) The case of *Parsons agt. Brown*, is *stare decisis* in this court. The only difference in the facts of the case are: 1st. The parties to the action are reversed. 2d. That the plaintiff, *Parsons*, claiming he was the owner, entered without process during the temporary absence of the tenant *Brown*, the defendant, and fastened up the premises, refusing the defendant admission, claiming he was not entitled thereto. The defendant, after demanding possession, undertook by force to obtain it, and the plaintiff resisted. The court held the plaintiff had a right to thus resist, and he recovered a judgment against *Brown*, the tenant, for \$500 damages.

The judge it is believed charged the exact converse of the rule laid down in that case.

Sub. 1. The court erred in refusing to charge the jury as requested, and the exceptions thereto are well taken. The court also erred in its charge to the jury, and the exceptions are well founded. The court also erred in refusing to charge as requested. And the exceptions thereto must be sustained.

(a.) It will be proper to examine the matters in their inverse order. As to the request and refusal to charge: 1st. That the judgment of the justice being *res adjudicata*, that the plaintiff was holding over after the expiration of his term.

(1.) This depends upon the construction to be given to the statute. (3 *R. S.* 5th ed. § 52, p. 840.) And for the sake of the argument, we will admit what was claimed by the counsel in the court below. That upon the perfecting of the appeal in the court below, with security, it stayed proceedings as to issuing the warrant. But by the express language of the statute, it had no other effect. The conclusiveness of the judgment as to the rights of the parties under the lease, and that the plaintiff's term had expired, and he was holding over his term without permission, was adjudicated

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upon, and settled between the parties. The express language of the statute is: "The proceedings before such justice may be removed by appeal to the county court of the county, in the same manner and with the like effect, and upon like security as appeals from the judgment of justices of the peace in civil actions, &c." In order to stay issuing of warrant, further security to be given to pay rent, &c.

(2.) It is only necessary for the court to examine what would have been the effect of an appeal from the judgment of a justice in a civil action, where the question was to be argued before the county court upon questions of law, upon the conclusiveness of such judgment, before affirmance or reversal, to see what was the effect of the judgment here upon the rights of the parties. For by express provision of the statute, the appeal was to have the like effect.

(3.) That in such cases, the appeal does not in any manner affect the conclusiveness of the judgment as between the parties, is so plain and well understood, that no argument is necessary to establish it. (*Harris agt. Hammond*, 18 *How. Pr. R.* 623; *Opin. STRONG*, J. 124; *Pruyn & Billis agt. Tyler*, *Id. Opin. GOULD*, J. 334; *Tyler agt. Willis*, 35 *Barb. S. C.* 213; *Opin. LEONARD*, J. 214.)

(4.) A judgment rendered in summary proceedings, until reversed, is as conclusive as any other. (*White agt. Coatsworth*, 2 *Seld.* 137; *Hyatt agt. Bates*, 35 *Barb. S. C.* 308.)

(a.) The judgment of the justice being *res adjudicata*, upon the question of the plaintiff's holding over his term, brings us to the consideration of the charge and exception thereto. That the defendant was a trespasser in taking possession of the building, &c.

(1.) We have heretofore endeavored to show that the defendant, as against the plaintiff, was in the lawful possession of the premises. It will be seen by the charge of the court, the jury were instructed that the warrant to put the defendant into possession was void, being issued after the appeal was perfected, with security, and by reason thereof, the defendant in taking possession of his property under it was a mere intruder or trespasser, having no right thereto as against the plaintiff. In other words, he made the defendant's rights in the matter entirely to depend upon the power of the justice to issue, and the validity of the warrant whereby the defendant got into possession of his building. We submit this is not true upon principle or authority.

(2.) The defendant's right to the possession of his property, did not solely depend upon the proceedings instituted before the justice, and the subsequent issuing of the warrant, and the defendant's receiving possession under the same. His rights in the matter depended as much, if not more, upon the question whether or not the plaintiff's term had expired for which he had leased the premises. This fact had been in dispute, and adjudicated against him. This being the case, the defendant, being the owner of the premises, could, without any proceedings whatever of a judicial nature, have taken possession of his building, and even if he had used force and violence in so doing towards the plaintiff, he could not have maintained an action of trespass against the defendant, for the forcible entry. Although in such case, even the defendant would not be justified in committing an assault and battery on the plaintiff in order to regain possession. (*Hyatt agt. Wood*, 4 *Johns.* 150; *Opin. SPENCER*, J. 160; *Jackson agt. Stansberry*, 9 *Wend.* 201, 202, 203; 3 *Black. Com.* 4, 5, 174, 179; *Turner agt. Maymott*, 1 *Bingham's R.* 158, 280; 7 *Term R.* 431, 432; 6 *Taunton*, 202; *Sampeon agt. Henry*, 13 *Pickering*, 36; *Opin. WILDE*, J. 39.)

In the case of *Turner agt. Maymott* (*supra*), the defendant took possession by force, and kept the plaintiff's property in his possession, without removing it from the premises. He would also be liable for forcible entry and detainer. (*See same cases.*)

(3.) But this right which is given by law to the defendant, the owner, is a very

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different one from that claimed by the plaintiff, and allowed to him by the court on the trial. To justify a party in taking possession of real property by force and violence, he must in any case have the title. He must have not only a right of possession, but a right of property therein absolute and beyond dispute. I do not believe a case can be found, where it is held that a person not holding the title, but a *mere right of possession*, has ever been allowed to enforce such right of possession by force and violence against a party in actual possession, and especially would it be true where the facts in regard to such rights were in dispute, and the party in possession was the owner of the premises. In such a case, a party, the plaintiff here, was bound to resort to his action. (3 *Black. Com.* 4, 5, 174 to 180, *sub. 2*, 179.)

The reason of the rule is apparent; a party merely entitled to a right of possession, where such possession is displaced by another claiming a right thereto, the case is balanced, and the court cannot determine where the actual right is; and, therefore, the action must be brought. The same rule applies to recaption of personal property. (*Newkirk agt. Sabler*, 9 *Barb. S. C. opin.* PARKER, J. 656; *Sampson agt. Henry*, 11 *Pickering, opin.* WILDE, J. pp. 387, 388.)

(4.) The case for the defendant here, is stronger than those cited. He was the owner of the premises, and got into the possession peaceably. If he got into possession by a proceeding which was void, or without any proceeding whatever, yet he was not an intruder or trespasser, unless the plaintiff had a better title and right to the possession of the premises than the defendant had. The plaintiff did not prove, or offer so to do, that he had any better right.

Sub. 2. These views lead us to the consideration of the requests to charge the refusal of the court, and the exceptions thereto.

(1.) If we were right that the judgment of the justice was *res adjudicata* upon the question of the plaintiff's holding over after the expiration of his term, then the defendant was rightfully in possession of his property, and was not an intruder or trespasser. (See cases cited, *sub. 1*, points 1, 2.)

(2.) It was not material in this case which party had the right to the possession of the building. This is in exact accordance with the judgment of this court in *Parsons agt. Brown* (15 *Barb. S. C.* 590, *opin.* WELLES, J. 593, and the other cases cited.) And the other requests were precisely in accordance with the judgment pronounced in that case, and unless it is to be overruled, the exceptions taken to the refusal of the court to charge, as requested, must be sustained.

(3.) In the first instance all the proof the defendant gave that he was entitled to the possession of the building, was that he had been in possession of the rooms for two years. He did not claim to have any title thereto, as owner or otherwise, and until the court by its rulings, compelled the defendant to show proceedings instituted to remove Sage, was it disclosed what was the foundation of the plaintiff's claim? The whole case shows there was no dispute about the title, and that the defendant was the owner of the premises. The only dispute was about the right to the possession, each party claiming such right. Unless the proceedings before, and the judgment rendered by the justice, are binding upon the parties, there is not a *scintilla* of evidence to show which had the right to the possession of the building, by virtue of the lease. The court held the judgment and proceedings were not binding. The parties were, therefore, left in exactly the same situation as if the proceedings had not been instituted. The plaintiff claiming a right to the possession on account of a prior possession, or claiming the right as tenant, whose term had not expired. The defendant, his landlord, claiming as the owner, and that the plaintiff's term had expired, and he was holding over. Under this state of facts, the defendant, in the absence of the plaintiff, took possession of the premises peaceably, without any process, or with process that was of no legal force or validity. After getting into actual

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possession, however, he fastens it up securely, re-rents a portion, remains there in person and refuses to surrender up his possession, claiming that by authority of law he has a right to hold it against a party who merely claims a simple right of possession, existing by virtue of a tenancy or prior occupation, and such party undertakes to reduce his claim by force and violence to actual possession. The owner and party in possession, opposes such force and violence, with like force and violence, and in so doing, and in defending his property and possession, injures the party attempting to deprive him of his property and possession. Yet notwithstanding all the force he uses, he is not able to maintain possession of his property. That a party under such circumstances is justified in repelling force by force, and not liable, is too clear for argument.

(4.) Either view the plaintiff may take, upon principle, and within the cases cited, the plaintiff is not entitled to maintain this action. 1st. If the plaintiff's term had in fact expired, the defendant was justified in taking possession without process. 2d. And when the defendant showed he was the owner of the premises, having the title thereto, it would give him the right to the possession, until the plaintiff could show a better title. And unless he did, he was not authorized in any event to use force to divest the defendant of his possession, and not then, if there was a reasonable dispute between the parties as regarded such right.

(5.) The rule of law as laid down by the learned justice in his charge to the jury, is only applicable to a case where a mere stranger or intruder, i. e., a person having or making no claim of right to the property, or the possession thereof whatever, should enter into the possession of another without his permission, which is certainly not the case here. The claim here was certainly under color of title, and honestly believed.

II. The court should have charged the jury as requested, that from the undisputed facts of this case, the plaintiff is not entitled to recover against the defendant, for the reason that by using all the force he did, it was insufficient to maintain his possession, but he was overpowered and compelled to surrender the same, and the exceptions thereto are well taken.

(1.) This would follow as a matter of course if we were right in our views in point I. (*Newkirk agt. Sabler*, 9 Barb. 652; *Opin. PARKER, J.* 657.)

III. The court erred in holding the warrant void. And in their charge to the jury, holding that the defendant was not rightfully in possession of the building; also that the appeal and bond given, and the proceedings had by the plaintiff, operated as a stay of proceedings, so that the justice had no right to issue the warrant to put the defendant into possession of the building; also that the warrant afforded the defendant no protection; and also that the warrant was entirely void, and the exceptions thereto are well taken.

(1.) To arrive at a correct conclusion on the matters embraced within the charge, it becomes necessary to examine carefully the provisions of the statutes in relation to summary proceedings.

The first is section 28, 3 Revised Statutes, 5th edition, page 836, declaring what officers to have jurisdiction:

Sub. 1. Where tenant holds over—this case. 2. Making default in payment of rent. 3. Tenant an insolvent. 4. Land sold on execution. This last subdivision added, laws of 1849, chapter 193, section 1. Sections 29 to 39, declare the manner of proceeding. Section 39 as amended in 1857 (*chap. 684, § 3, Laws 1857*), declares: "If the decision of the magistrate or the verdict of the jury is in favor of the landlord, then warrant to issue." The amendment of 1857 inserted "verdict of the jury." This same statute gave right of trial by jury, provided demand made. (*See same chap. Laws 1857, § 2.*) Section 40 declares how the warrant is to be executed. Section 43 declares the effect of the issuing of the warrant. Section 44 provides for stay.

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ing issuing of warrant in case of proceeding for the non-payment of rent. Section 45 provides for staying issuing of warrant, when the application is founded on fact, that the tenant or lessee has taken the benefit of any insolvent act, &c. Section 46 provides for staying the warrant when the application is founded upon an alleged sale by execution, &c. Section 47 provides *certiorari* may issue to examine adjudications made, &c., but expressly provides that the proceedings shall not be stayed or suspended by such writ of *certiorari*, or any other writ or order of any court or officer. Sections 48, 49, 50, 51, provide for award of restitution to tenant, in case he succeeds, recovery of costs by prevailing party, rights of landlord not impaired in other cases, and manner of entry of judgment. Section 52 reads as follows: "The proceedings before such justice may be removed by appeal to the county court, in the same manner, and with the like effect, and upon like security as appeals from the judgment of justices of the peace in civil actions, except that the decision of such county judge shall be in affirmance or reversal of such judgment, and be final. But in addition to the security for such judgment, as required by law in case of such appeal, in order to stay the issuing of such warrant or execution, there shall, in case of appeal by the tenant, be security also given for the payment of all rent accruing or to accrue upon said premises, subsequent to the said application to such justice."

Upon the construction of this section hinges the right of the justice to issue the warrant in this case.

(2.) To arrive at a proper construction which should be given to it, it is first necessary to inquire the intention of the legislature. The object in view is apparent at a glance, viz: To simplify the practice, and conform as near as possible to the change made on the adoption of the Code of Procedure. And they gave the county court power to hear and determine the appeal, the same as appeals from judgments in civil actions. It may be asked, if the statute was only enacted to give parties the benefit of an appeal, why insert the matter in relation to staying the issuing of the warrant?

(a.) It will be seen by reference to the various sections, that only three cases were provided for where the warrant could be stayed, viz: *Non-payment of rent, insolvency, sale on execution.* (§§ 44, 45, 46.) Where proceedings were instituted on the ground the tenant was holding over after the expiration of his term, the issuing of the warrant was never stayed.

(b.) It will be perceived that the tenant was bound to pay the costs and the rent immediately, or give security they would be paid within ten days, in cases for non-payment of rent, to stay issuing of warrant, but no provision would be made for rent which would subsequently accrue, and unless the appeal was heard and determined before the next payment of rent became due, new proceedings would have to be instituted in case of default to pay. In the case where the lessee had taken the benefit of an insolvent act, &c., the warrant was to be stayed on payment of the costs already made, and approved security for payment of the rent.

And also in the case of alleged sale on execution, the costs were to be paid and security given for use and occupation, &c.

(c.) It will be seen in each of these cases, the same effect would follow substantially, if an appeal was taken as provided by the Code. For to effect the appeal, the costs of the proceedings would have to be paid, and security given to pay the rent, or the value of the use and occupation, in case of sale on execution. (*Spraker agt. Cook, 16 N. Y. R. 568; Opin. DENIO, J. 573, 574.*)

(d.) In each of the three cases named, by allowing the appeal and staying the issuing of the warrant, the landlord, or the party claiming under the sale on execution, would not in any material matter be placed in a worse or different situation than he would have been if he had pursued the course allowed before the statute of 1849,

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i. e., removed the cause by *certiorari*, and given the security required by the various provisions for a stay.

(3.) But the case here is entirely different. In case of proceedings for removal, because of the tenant's holding over after the expiration of his term, the issuing of the warrant was never stayed. (*Crary's Practice, Special Pro.* 469.)

(a.) There is nothing to show in the statute that it was intended to embrace any cases not before provided for. Without putting a strained or forced construction on the language used, the issuing of the warrant is only to be stayed in the cases previously provided for. It is believed this will be apparent on a close examination of the language used.

(b.) Suppose, for the sake of the argument, that there had been another case provided for under proceedings had for holding over under alleged sale on execution, where the party was not allowed to have a stay in issuing the warrant, and the same language was used as is used here, viz: " * * * in order to stay issuing of such warrant. " * * * Would it be questioned that the legislature did not intend to embrace such a case, but only intended by the language used, such warrant to embrace the case, where a stay was before allowed? The word *such*, before warrant, used in this statute, was employed to restrict the operation thereof, so as to only include the cases where a stay could be had before. If it had been intended that the stay was to be general in all cases, they would have employed language to have made it applicable generally, i. e., " * * * in order to stay issuing of a warrant. " * * *

If the statute is not broad enough to include the case mentioned, the same reasoning will apply when the statute is such that no stay whatever is allowed.

(4.) Again, it would seem from the subsequent language used, that the legislature did not intend to have the warrant stayed only in those cases where it was allowed before. The security given is for the "payment of all rent accruing or to accrue upon said premises, subsequent to the application to the justice."

(a.) In the case where the proceedings are founded upon the ground the tenant is holding over after the expiration of his term, there is no rent accruing or to accrue. If the landlord succeeds upon the appeal, the judgment is conclusive that no rent had accrued or was to accrue.

(b.) The case of *Spraker agt. Cook (supra)*, does not conflict with this view, and we think the distinction between the two cases is plain to be seen. 1. The object of the legislature in enacting the statute, as was mentioned, was to provide a uniform practice in the reviewing of cases decided in courts of justices of the peace. The appeal gave to the parties the rights they had if the cause was removed by an award of *certiorari*. A party was allowed a stay of proceedings, if the cause was removed by *certiorari*, in cases of sale on execution. The bond provided for the payment for the rent and occupation of the premises. (See sub. 3, § 46, *opin. DEMO, J. Spraker agt. Cook, supra*, p. 374.) 2. In the case of a tenant holding over, there was no provision for recovering use and occupation. 3. In many cases the value of the use and occupation would in no wise compensate the landlord for the damages he had sustained. If he had rented the premises to another party for a larger sum, he could only recover for the value of the use and occupation in the market. If he had made a sale or rented to another, for a term of years, the premises, he would be liable for damages to the lessee or grantee, for not giving him possession. It would be impossible to determine in such case the amount of security that should be required to save the landlord harmless in the premises.

(c.) In the cases of non-payment of rent and insolvency, if the tenant was stayed the landlord would not suffer if his rent was secured, and the tenant could not deny his title. Where a party claimed under an alleged sale on execution, he could only claim the rights which the judgment creditor had, and until in possession, he could

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only recover for use and occupation and ~~make~~ profits, and if they were secured, he suffered nothing. But where a tenant should hold over his term, his damages would be always dependent on the circumstances of each case, and the landlord would be compelled to resort to an action, and it is extremely doubtful, although he had been compelled to pay much larger damages, if he could recover any greater sum than the mere value of the rent of the premises during the time the appeal was pending, and up to the time it was determined, which might be at a time when he could not rent the same, and he would have to let them lie idle.

(5.) If the construction given to the statute by the court should be upheld, the whole scheme created by the legislature for the summary recovery of the possession of premises, would be thwarted. (*Druyan agt. Hogan*, 16 *How. Pr. R.* 164; *Opin. WOODRUFF*, J. 166, 167, 168.)

(6.) Lastly, the court should not give a construction to this statute which would involve the subject with so many difficulties, unless the same is imperative, and incapable of no other construction; but let the legislature render it fixed and certain, as to what was really intended, and although the language used is general, yet if the intent and meaning can be discovered to be otherwise, that should control. And that "intention should be deduced from a view of the whole and every part of the statute taken and compared together. The real intention, when accurately ascertained, will always prevail over the literal sense of the terms." (*Kent's Com.* vol. 1, 5th ed. p. 461, *marginal*, p. 462; *Homes agt. Carley*, 31 *N. Y. R.* 289; *Opin. POTTER*, J. 289, 291.)

And certainly if the language used is capable of two constructions, the court will give that which is consistent with the intention of the legislature in the enactment of these statutes, which was to enable landlords to get speedy possession of their premises. And it is submitted the court will not give such a construction to the statute as will compel them to give a meaning to the language used, different from its ordinary import. In the case of *Spraker agt. Cook* (*supra*), this was done, and the statute construed so as to extend its meaning to its utmost extent. But that was a case where a stay was allowed before. But in this case a stay was neither allowed, but the language used will have to be tortured, and a different and forced meaning given to the words used to embrace the case.

IV. There should be a new trial, with costs to abide the event.

D. J. SUNDERLIN, for plaintiff.

I. The appeal was duly made, was duly perfected, and with the execution and service of the bond on the justice, it not only stayed all further proceedings on the judgment, but it removed the proceedings before the justice into the county court. (*Laws of 1849*, § 5, sub. 1, 2 and 3; *Duel agt. Burt*, 24 *Barb. S. C. R.* pp. 440-2; *Thompson agt. Blanchard*, 2 *Com.* 561.)

Justice BIRDESEY, in the 24 *Barbour*, above cited, on page 442, says: "I think the method of appealing will be as follows: The notice of appeal must be given in the manner provided by section 354 of the present Code. Security for the judgment must be given in the form prescribed by section 356 of the Code, which it would seem from subdivision 3, of section 5, of the act of 1849, must be approved by some officer formerly competent to allow appeals to courts of common pleas. (2 *R. S.* 258, § 191, [187.]) Although no allowance of the appeal itself is now necessary.

"In addition to this, in cases of an appeal by the tenant, in order to stay the issuing of the warrant or execution, security must also be given for the payment of all rent arising or to arise upon the premises, subsequent to the application to the justice."

Judge BRONSON says, in *Thompson agt. Blanchard* (2 *Com.*), at page 582: "We

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think an appeal is perfected, within the meaning of the Code, when the proper undertaking, with an affidavit of the sureties, has been executed, and notice of the appeal has been served on the adverse party, and on the clerk with whom the judgment or order was entered."

If the appeal was perfected, then the proceedings before the justice were removed to the county court. The party appealing had done all that was required of him.

He had sought another tribunal; the power and jurisdiction of the justice was superseded, and nothing remained for him to do except the ministerial act of making his return (if it was not already made), which is quite apparent from his return.

By the appeal, he had lost all jurisdiction over the proceedings, and he could no more issue his warrant to enforce his judgment, than he could if no such proceeding had been consummated.

II. If by the appeal being perfected, the proceedings were in fact removed to, or pending in another court, all further proceedings in the cause before the justice were effectually stayed. It was not a stay resting in the discretion of any court or judge, but it was a statute stay of proceedings; the law had declared the stay, and pronounced his jurisdiction at an end, so far as the enforcement of his judgment was concerned.

Any attempt, therefore, on the part of the justice to enforce his judgment, was without jurisdiction, and void.

Not only the justice issuing the warrant, and Harpending, at whose instance it was issued, but the sheriff, and all persons who executed, or assisted in the execution of the warrant, were trespassers.

Sage had the lawful possession. Harpending was unlawfully there. He had the tenant's bond for rent accruing at the very time, and yet sought to eject him without any legal right to do so.

The plaintiff claimed only to hold possession by virtue of his writ of possession.

All other ground was, therefore, waived.

III. If the statute prohibits an officer from doing an act, and he does it in violation of the statute, the party at whose instance, and for whose benefit it was done, can acquire no right under or by virtue of the act, and the act itself is absolutely void.

It was claimed on the trial, that the statute of 1849, in reference to appeals and staying proceedings, did not apply to this class of proceedings to recover the possession of land, but it is apparent from the reasoning of Judge DENIO, in *Spraker agt. Cook* (16 N. Y. R. [2 Smith,] 568), that the provision applies to all cases of summary proceedings cognizable by a justice of the peace.

IV. The justification of the defendant entirely failed. The ruling of the judge at the circuit was clearly right. The charge was quite as favorable to the defendant as the facts would warrant; indeed, he has no reason to complain, and a new trial should be denied.

By the court, JAMES C. SMITH, J. It was held at the circuit that the warrant issued by the justice was void, and consequently, that it furnished no justification to the defendant. In order to affirm this ruling, it is necessary to maintain, either, that the security given on bringing the appeal, stayed the issuing of a warrant, or that by the operation of the appeal itself, the proceeding was transferred to the county court, so that the justice could no longer act in it. These

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propositions will be considered in the order in which they are stated.

The question whether the issuing of a warrant was stayed by the security given, depends upon the construction of certain statutory provisions respecting summary proceedings to recover the possession of land, to which it becomes necessary to refer.

In 1849, an act was passed amending the Revised Statutes relating to summary proceedings, so as to confer jurisdiction of such proceedings upon justices of the peace. (*Laws 1849, p. 291, chap. 193.*) One of the sections of said act provided that the proceedings before a justice may be removed by appeal to the county court, in the same manner, and with the like effect, and upon like security, as appeals from the judgments of justices of the peace in civil actions, but that in case of appeal by the tenant, in order to stay the issuing of a warrant or execution, security should also be given for the payment of all rent accruing or to accrue upon the premises, subsequent to the application to the justice. (§ 5, sub. 2.) It is by virtue of this latter clause of the section, that the undertaking given in this case is claimed to have operated as a stay. The defendant's counsel insists, however, that the provision as to a stay does not apply to proceedings instituted against a tenant solely on the ground that he is holding over after the expiration of his term, and I am inclined to think in view of the provisions of the Revised Statutes, *in pari materia*, that the construction contended for by him is correct.

The Revised Statutes provide that summary proceedings to remove tenants, may be resorted to in four distinct classes of cases. 1. Where the tenant holds over after the expiration of his term. 2. Where he holds over after default in the payment of rent. 3. Where the tenant has taken the benefit of an insolvent act, or of an act relieving from imprisonment; and 4. Where such person continues in possession of real estate which has been sold under execution against him, after title under such sale has been perfected. (2 R. S. 512,

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§ 28.) Section 43 provides that whenever a warrant shall be issued for the removal of the tenant, the relation of landlord and tenant between the parties, shall be deemed to be cancelled and annulled. The next three sections provide for a stay of the issuing of the warrant in each of the last three classes of cases, on security being given by the tenant, as required by the statute. In the case of a proceeding for non-payment of rent, the tenant is to pay the rent due and the costs, or to give security for the payment of them in ten days; and by an amendment adopted in 1857, if he does not within the ten days produce to the magistrate satisfactory evidence that the rent and costs have been paid, the warrant may issue at any time thereafter. (*Laws 1857, chap. 684, p. 510, § 4.*)

When the application is founded on the fact that the tenant has taken the benefit of an insolvent act, &c., the tenant must pay the costs, and give security for the payment of the rent as it shall become due. And where it is founded upon an alleged sale by execution, the occupant must pay the costs, file an affidavit that he claims possession by virtue of some title or right acquired after the premises were sold, or as guardian or trustee for another, and execute a bond to pay the costs which may be recovered against him in any ejectment that may be brought by the applicant within six months, to pay the value of the use and occupation of the premises from the date of such bond till the applicant shall recover possession in such ejectment, and not to commit waste. But no provision is made for staying the issuing of a warrant in the case of an application on the ground that the tenant is holding over after the expiration of his term.

Section 47 provides for a *certiorari* from the supreme court to review any adjudication made in such proceedings, but it directs that the proceedings shall not be stayed by such *certiorari*, or any other writ or order of any court or officer.

Section 48 provides, that whenever any such proceedings brought before the supreme court by *certiorari*, shall be

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reversed or quashed, the court may award restitution to the party injured, with costs. And the 49th section provides, that in all cases the prevailing party shall recover costs, and may maintain an action to recover them; and if the proceedings be reversed or quashed by the supreme court, the tenant may recover any damages he may have sustained by reason of such proceedings, with costs, in an action on the case.

While, on the one hand, the stringency of these provisions evinces the design of the legislature to make the proceedings summary, to which they relate, on the other hand, they attempt to protect the substantial rights of tenants, and they are surely applicable as well to proceedings before justices of the peace, under the act of 1849, as to those instituted before any of the other magistrates to whom jurisdiction was given by the Revised Statutes. The jurisdiction of justices of the peace is conferred, not by an independent statute, but by an amendment of section 28 of the Revised Statutes, the effect of which is to include justices of the peace among the magistrates who are vested with jurisdiction by that section.

But the provisions of the act of 1849, respecting the stay of the issuing of a warrant, apply exclusively to proceedings before justices of the peace. If they have the effect which the counsel for the plaintiff attributes to them, it follows that a tenant holding over after the expiration of his term, if proceeded against before a justice of the peace, may stay the issuing of a warrant after judgment against him, but not if he is proceeded against before any of the other classes of magistrates having a co-ordinate jurisdiction. And if this be so, the right is of little value to tenants, proceeded against on that ground, since it is in the power of landlords to deprive them of it by instituting proceedings before some magistrate other than a justice of the peace. The better construction seems to be that the section of the act of 1849, above referred to, does not create a right to stay the issuing of the warrant in a case where it did not previously exist, but it

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provides that in order to exercise the right to stay, in cases where it previously existed, security shall be given as therein prescribed. Its language is, not as in the sections of the Revised Statutes, *in pari materia* (2 R. S. p. 515, §§ 44, 45, 46), the issuing of the warrant "*shall be stayed*," if the tenant shall give the security prescribed, but it is "*in order to stay* the issuing of such warrant," security shall be given, &c. This implies a right to stay, already existing, and it prescribes the form of security to be given in order to exercise such right.

It is by no means clear that the section supersedes the provisions of the Revised Statutes, even as to the form of security, or that it does anything more than to require an additional security in the case of an appeal; but it is not necessary to decide that point. The construction above adopted, gives full effect to the language of the section, leaving it to operate on the three classes of cases in which a right to stay the issuing of a warrant is given to the tenant by the Revised Statutes.

The proposition that the appeal, of itself, deprived the justice of authority to issue a warrant, requires but a moment's consideration. If the legislature intended that an appeal should have that effect, it was useless and unmeaning to enact that in order to stay the issuing of a warrant, security should be given in addition to that required on appeal. The appellate court could not issue a warrant upon the judgment of the justice, and if the justice could not do it by reason of the appeal, the giving of further security to prevent it, would be an idle ceremony. I apprehend that an appeal taken by virtue of this statute, of itself, merely transfers the proceedings to the county court for the purpose of review, and does not affect the power of the justice to issue a warrant to enforce his judgment.

If these views are correct, the warrant was regular and valid, and the defendant having been put into possession of the premises by virtue of it, was justified in using so much

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force as was necessary to defend himself and maintain his possession.

But as the construction of the statute is not altogether free from doubt, and there are other views of the case leading to the conclusion above stated, I will briefly consider them.

If it be assumed that the justice had not power to issue a warrant after the appeal, nevertheless, his judgment, until reversed or set aside, was of force as an adjudication, and it determined that the lease had expired, and Harpending was entitled to the possession of the premises. The fact that an appeal had been taken to another court, did not affect the conclusive nature of the judgment as a bar, while it remained unreversed. (*Harris agt. Hammond*, 18 *How. Pr. R.* 123.) The counsel for the defendant requested the court to charge to that effect, but the learned judge declined, and charged that the judgment ceased to be *res adjudicata* when the appeal was perfected, with security. The point was material to the defendant, for if he was stayed from suing out a warrant on the judgment, yet in this collateral action he was entitled to use the judgment as evidence of his right to the premises, and it was important to him to maintain that he had a right. I conceive the ruling on this point was erroneous.

But let it be further assumed not only that the warrant was void, but also that the judgment had ceased to be a bar, and that it was an open question whether the tenancy had terminated, or was still in force, how then stands the case? The landlord, and the owner in fee, claiming that the term had expired, enters without process, and without force, during the temporary absence of the tenant, but the tenant attempting soon after to oust him by violence, the landlord resorts to force to maintain his possession. Which committed the first assault? There is not a particle of evidence that the plaintiff was entitled to the possession. His lease is not shown, and nothing appears on that point, except that he claimed that the term continued till April, 1866, and the defendant disputed the claim. The defendant, when he entered, was

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not guilty of an assault, or a breach of the peace. Even if it be assumed that he was a trespasser, his position was very different from that of a mere stranger. He owned the premises in fee, and claimed to be entitled to the possession. Under these circumstances, the plaintiff had no right to take the law into his own hands, and attempt to dislodge the defendant by force, although his intrusion was but recent. The defendant being in the actual possession, had a right to maintain it, and to use force, if necessary for that purpose. This precise point was adjudged by this court in the case of *Parsons agt. Brown* (15 Barb. 590).

The defendant being justified in using so much force as was necessary to defend himself and maintain his possession, the only question for the jury, in any view of the case, was, whether he used an excess of force.

The result is, that a new trial should be ordered.

SUPREME COURT.

DANIEL H CHRISTIE agt. ELIHU K. CORBETT.

In an action for the recovery of possession of personal property, where the defendant restores the possession to the plaintiff before the actual commencement of the action, and the plaintiff objects to the manner in which the property is returned by the defendant, as being injurious to him, but, nevertheless, accepts the possession, the action cannot be maintained.

It is error in such a case to let the cause go to the jury ; the court should grant a non-suit, or direct the jury to find a verdict for the defendant.

Erie General Term, September, 1867.

Before MARVIN, DANIELS and E. DARWIN SMITH, Justices.

MOTION for a new trial upon exceptions first heard at general term.

Action to recover the possession of a horse, the property of the plaintiff, wrongfully detained by the defendant. The defendant took possession of the horse about October 27,

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1866, and retained him about a week. The plaintiff demanded the horse two or three times, and the defendant refused to deliver him up.

The plaintiff, on Saturday, November 3d, caused his attorney to prepare the papers in this action. The papers were delivered to the sheriff for service, between six and seven o'clock in the evening, in Batavia. The next day (Sunday) the defendant put the horse in the plaintiff's lot, and so informed the plaintiff. The plaintiff put the horse in his own barn, where he was when the sheriff came to serve the papers in the action, on Monday, about noon. The sheriff had just served the summons upon the defendant, and then called at the plaintiff's, and found the horse in the plaintiff's barn. The father of the defendant was with the sheriff. The sheriff said, if the parties did not settle, he should put the horse in a third man's hands, and he put him into Mook's hands, a neighbor, where he remained some days, the plaintiff taking care of him, and then took him home. The plaintiff went with the sheriff to Mook's, and led the horse (a colt).

The defendant first took the horse into his possession under a claim of right, as the horse was trespassing upon his premises. The right of the defendant to retain the horse was disputed, and a suit threatened.

The defendant's counsel moved for a non-suit, on the ground that the horse being in possession of the plaintiff at the time the action was commenced, and not in the possession of the defendant, the action could not be sustained.

The motion was denied, and the defendant excepted.

The court charged that "the act of the defendant in turning the horse upon another lot on plaintiff's premises, was in itself a wrongful act on his part. That if the jury should find that the defendant then intended to return the horse to the plaintiff's possession, and the plaintiff thereupon accepted the horse, and took him into his possession, then the action could not be sustained."

The counsel for the defendant then insisted that under this

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charge and instruction, there was no question to submit to the jury.

The court declined so to hold, but submitted the case to the jury, and the defendant excepted thereto.

To understand the charge, it will be proper to state some more of the evidence. The plaintiff, as a witness, testified, that "the defendant told him he had put the horse into his (plaintiff's) lot; that he (plaintiff) objected to his doing it in that way; that he was a young horse, and would not be contented."

The horse had been put in the pasture next the road, not the lot he was pastured in.

The plaintiff took the horse from the lot and put him in the barn.

M. H. PECK, for plaintiff.

WAKEMAN & BRYAN, for defendant.

The action is for replevin in the *detinue*, pure and simple: for "wrongfully detaining plaintiff's grey horse." The judgment demanded is one "awarding the possession of the said property to the plaintiff," and damages for detaining same.

Answer "denies that at the commencement of this action defendant detained" plaintiff's horse.

Also sets up that the horse was seized and taken into custody by defendant while trespassing on his premises, pursuant to chapter 459, laws of 1862; that due notice was given by a justice of the peace, and such statute freely complied with.

Also sets up the return of the horse by defendant to plaintiff, and its acceptance by plaintiff.

I. The undisputed evidence is, that the papers were not served until about noon, on Monday, November 5th. This action was not commenced until the actual service of process. (*Code*, § 99.)

The horse was at the very time in plaintiff's own stable. He having on the day before, taken the horse from his own

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lot and put him into his own barn. Mook, plaintiff's witness, says : "When I first saw colt, Christie was leading him ; plaintiff fed the colt at my barn, and took him away."

Christie was told "on Saturday, if he would stop proceedings, they would give up the horse," and Wakeman told him same day, "it could be got along with without a law suit."

The horse thus trespassing on defendant's premises, was taken up in good faith, under act of 1862, and actually restored to plaintiff, and taken into his manual custody the day before service of papers. It does not detract from the legal effect of the return, that the horse was put back into another or less suitable lot. Nor does the grumbling of plaintiff, that he objected to his turning him back in that way ; that he would not be contented, &c., affect the fact of the actual return of the animal to plaintiff's adjoining lot, and the taking and shutting him up by plaintiff personally.

II. Replevin (in the *detinet*) is simply an action to recover the possession of personal property (*Code*, § 206), and it claims the "immediate delivery" of such property.

"The action to recover the possession of personal property is based upon a wrongful detention of it, and such wrongful detention must exist at the time of the commencement of the action." (*Savage agt. Perkins*, 11 *How. Pr. R.* 22 ; *Opin. by Bowen, J.* and cases cited ; *Elwood agt. Smith*, 9 *How. Pr. R.* 528 ; *Roberts agt. Randall*, *Gen. Term Sup. Court*, 5 *Id.* 328.)

This is not a case where "the defendant before suit has wrongfully parted with the possession," to a third party. (*Brockway agt. Burnap*, 16 *Barb.* 315.)

The cases bearing on this point, are elaborately reviewed in *Nichols agt. Michael* (23 *N. Y. R.* 264 to 275). Says SELDEN, J. (p. 272) : "Where a person is in possession of goods belonging to another, which he is bound to deliver on demand, if he parts with that possession to one who refuses to deliver them, he is responsible in *detinue* equally with the party refusing."

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We insist that this is not a case where, in any sense, it can be claimed that the defendant wrongfully or improperly parted with the possession of the horse, or where he delivers possession to another before action brought.

Hence it follows that a non-suit on the whole case should have been granted by the court, it appearing that there had been an actual return of the horse by defendant, and an actual receiving of the horse into possession by plaintiff before suit commenced.

This particular form of action will not lie, where, in point of fact, the plaintiff has the identical property in his own custody when the action is commenced. Such a ruling works no injustice. The party can still have redress for the original taking and detention. He can recover damages therefor, but it is a palpable absurdity to award to him possession of that which he already has.

III. As matter of law, the facts disclosed in the evidence constituted an acceptance of the horse by plaintiff, as set up in answer number three.

No other objection was made by plaintiff, than as to the horse being too young to be put into *that* lot, and while so saying, at the same time he *took up* the animal and put him into his barn. The taking of the horse by the sheriff from plaintiff's barn, and turning him over to Mook—to be fed and taken care of by plaintiff—was a nullity so far as the sheriff was concerned, and a farce on the part of the plaintiff.

IV. Defence number two was ruled out *in toto*, on the ground that the court of appeals had expressly decided the law of 1862, in relation to strays, as wholly unconstitutional and void. We had no access to any opinion or decision that affect this point, and hence desire the point should be reviewed on this motion.

By the court, MARVIN, J. By the Code (§ 99), the action is commenced when the summons is served. At the time this action was commenced, the horse was in the actual pos-

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session of the plaintiff. The defendant had returned the horse, and made no further claim to detain him. It seems to me that this simple statement must decide the case. The action was to recover the *possession* of the horse, *wrongfully detained*. At the time the action was commenced, the wrongful detention had ceased, and the plaintiff was in full possession of his property. As I understand it, the learned justice at the circuit was of the opinion, and so charged, that if the defendant, by turning the horse into the plaintiff's lot on Sunday morning, intended to return the horse to the plaintiff's possession, and the plaintiff accepted the horse, and took him into possession for that purpose, the action could not be sustained.

The counsel for the defendant, in view of this charge, claimed that there was no question for the jury, but that the court should dispose of the case. The counsel was, I think, right. Assuming that there was some importance in the question of the intention of the parties, I think the evidence was so decisive, that the court should have decided the case. It appears that the defendant took up the colt as a trespasser, and was proceeding under the act of 1862, and had incurred some costs. He was willing the plaintiff should have the horse, on paying the costs. This the plaintiff was unwilling to do. Counsel was taken in Batavia, on Saturday, when the defendant was probably advised that the statute under which he was proceeding would not protect him, and he concluded to restore the horse to the plaintiff. He did this on Sunday morning, by putting him into plaintiff's pasture, adjoining the highway, and he notified the plaintiff thereof.

What objection did the plaintiff make, as he states as a witness? He says: "I objected to his turning him back in that way; that he was a young horse, and would not be contented; it was Sunday morning; he turned him into the lot next to the road, not the lot he was pastured in." In another place he says: "I took the horse from my lot, and put him in my stable." Now as I understand this evidence, there was

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an absolute, unqualified return of the horse, and the plaintiff unqualifiedly accepted him. The only objection he made was, that "the colt was put into the wrong pasture; that he was a young horse, and would not be contented;" and there-upon he went and caught the colt, and put him in the stable. I do not see any occasion for the remark of the judge, that "the act of the defendant in turning the horse upon another lot of the plaintiff's premises, was in itself a wrongful act on his part." But if this was even so, the plaintiff waived it, and went and took the colt and put him in the stable.

There was no question for the jury. The court should have decided the matter, and non-suited the plaintiff, or directed the verdict for the defendant. The jury must have found, under the charge, that the defendant did not intend to return the horse to the plaintiff's possession, or that the plaintiff did not accept the horse, or take him into his possession for that purpose; a finding, as I think, directly against the evidence. We are, however, examining the case only upon the exceptions. I think the exception to the refusal to non-suit was well taken; also to the refusal to direct a verdict.

This case does not belong to the class of cases referred to by the plaintiff's counsel, where the defendant has wrongfully parted with the property to a *third person*, before the commencement of the action. (*Brockway agt. Burnap*, 16 Barb. 309; *Nichols agt. Michael*, 23 N. Y. R. 264.)

In this case the defendant restored the horse to the plaintiff, who took him into his possession, and had full power and control over him before the action was commenced.

There must be a new trial, costs to abide the event.

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COURT OF APPEALS.

CHARLES KING and others, respondents agt. NATHAN C. PLATT'S EXECUTORS, appellants.

An order made on an application to set aside a *judicial sale*, made under a judgment of foreclosure, on the ground of *fraud*, involves a question of strict legal right, and the decision thereon is *not discretionary*. The order can, therefore, be appealed to the *court of appeals*, under section 11, subdivision 3 of the Code, as a final order affecting a substantial right, made in a summary application in an action after judgment.

The appeal from such an order can be taken within the two years prescribed by section 331 of the Code, as it is a final order, in the nature of a judgment.

March Term, 1867.

THE respondents moved to dismiss the appeal on the grounds stated in the opinion. The motion was denied.

JOHN H. REYNOLDS, *for respondents.*

JAMES EMOTT, *for appellants.*

BOCKES, J. The motion at special term was to set aside a judicial sale, made under a judgment of foreclosure.

The motion was denied. On appeal to the general term the order was affirmed. An appeal was then taken to this court from the order of affirmance.

The motion now is to dismiss the appeal, as I understand it, on two grounds:

First. That the order is not appealable, because not falling under any of the subdivisions of section 11; and,

Second. Because the granting or refusing of the order was in the discretion of the court below.

I think the order comes within the purview of subdivision 3, of section 11.

The appeal is from an actual determination of the general term, and is a final order affecting a substantial right, made upon a summary application, in an action after judgment. It plainly answers each of these requirements.

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But it is insisted that this is not a final order.

It denied the motion, and ended the proceeding.

Nothing further could be done in the proceeding.

It closed finally the summary application, and consequently was a final order, and no right remained to the party except to appeal.

So I think the order would have been equally final had the motion been granted, instead of refused.

It would, in that event, be complete and final as to the application ; the judgment of the court on the merits of the application.

Whichever way decided, it was final, in the sense of a final adjudication.

A final judgment, means a judgment which concludes the parties, as regards the subject matter in controversy, in the tribunal pronouncing it, whichever way the decision may be given. It is called final, in contradistinction from interlocutory

This is the view taken by this court in *Buffalo Savings Bank* agt. *Newton* (23 N. Y. R. 160). In that case the sale was set aside, and DENIO, J., says : "The order was final, within the meaning of section 11 of the Code." All the judges concurred.

But notwithstanding all this, if the order rests purely in the discretion of the court, the appeal will, for that reason, be dismissed.

And this brings us to examine the cases cited by the respondents' counsel on this motion.

In the last case cited (*Buffalo Savings Bank* agt. *Newton*, 23 N. Y. R. 160), the appeal was dismissed, Judge DENIO says, notwithstanding the order fell directly within the provision of subdivision 3 of section 11, still "it rested purely in the discretion of the court to grant or refuse."

On looking into that case, it will be seen that the motion was addressed to the favor of the court, and was not urged as a matter of legal right.

No irregularity even was suggested, but the party asked a

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favor, and hence the granting or refusing it was purely discretionary.

In *Dows agt. Congdon* (28 N. Y. R.), a resale was ordered, and also a reference was directed, to ascertain the value of the land without improvements, with a view to further action in the case. The appeal to this court was dismissed on the ground that it was not final. All the judges concurring.

Even Judge EMOTT, who dissented on other grounds, concurred in this. In this case Judge WRIGHT well remarks, and notes the true distinction now before us—that the granting of such an order (an order setting aside a judicial sale), when it involves no question of strict legal right, is within the discretionary power of the court below, and not appealable; clearly, and, as I think, very justly implying that if the motion rested on facts giving a strict legal right to demand it, the order would be appealable.

In *Wakeman agt. Price* (3 N. Y. R. 334), the sale was set aside. It was decided that an appeal would not lie, because the sale was in all respects regular and fair, and the motion was, as the case states, addressed to the favor of the court; hence purely discretionary. The case of *Hazleton agt. Wakeman* (3 How. Pr. R. 457), was similar to *Wakeman agt. Price*, in all respects.

So it seems that the four cases on which the motion before us is based, failed to give it support, unless this case, like those cited, was before the supreme court as a matter of pure discretion, not involving a question of strict legal right.

This is the rule laid down by Judge WRIGHT, in *Dows agt. Congdon*, and is unquestionably sound.

So in *Tripp agt. Cook* (26 Wend. 143), the same distinction was marked, and it was then said in substance, that an order which gave effect merely to the will of the judge, was one resting in pure discretion. Not so, however, when a case was made for the application of legal rules and principles of equity.

It now remains to be seen whether the case before us does

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involve a strict legal right. If it does, the appeal is properly taken.

The party claimed that he had been defrauded at the sale ; that it was unfairly and unjustly conducted, to his injury, and he alleged that the plaintiff and purchaser approached bidders and dissuaded them from bidding ; that they need not bid, for the plaintiff would out-bid them, and intended to bid it in, and that such persons as wanted to purchase, could buy on more advantageous terms of the plaintiff, and thus discouraged and prevented bidding. The motion was, therefore, grounded on fraud, and thus became a strict legal right.

If the charge of fraud should be sustained, the party was entitled to have the sale vacated, not as a matter of favor, but as a matter of right, and he could have maintained a direct action in equity to set aside the sale, instead of proceeding by motion.

The case of *Tiernan agt. Wilson* (6 J. Ch. 411), and of *Cloves agt. Dickenson* (5 J. Ch. 235), afterwards in the court of appeals (9 Cowen, 403), are full on this point. See also *Cantine agt. Clark* (41 Barb. 629). So it seems that fraud in conducting a judicial sale, gives a party a right of action, which may be enforced in a suit instituted for that purpose. This proves it to be a strict legal right, and it follows that a motion to set aside a sale for fraud involves such right, and is not, therefore, discretionary.

This appeal should not, therefore, be dismissed on the ground that the motion was addressed to the favor of the supreme court.

This view is in strict conformity with the rule stated by Judge WRIGHT, that the granting of such an order, when it involves no question of strict legal right, is within the discretionary power of the court below, and not appealable.

It is next urged that the appeal in the case under subdivision 3, of section 11, is controlled by section 331, which requires the appeal to be taken "within two years after the judgment shall be perfected by filing the judgment roll."

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The appeal in this case was not within the limitation above specified, unless we either regard the roll incomplete until the order granted on the motion, and also the order of affirmance at general term was attached and made part of it, or unless we regard the order appealed from as a final order in the nature of a judgment.

It was said in *Bank of Genesee* agt. *Spencer* (18 N. Y. R. 152), that this class of orders rested on the assumption that the judgment was valid, and the proceeding in such case was based upon it, which proceeding itself might terminate in a "final order in the nature of a judgment." This, it seems to me, is a sensible construction to put on this class of orders. The proceeding is a new and irregular one, and demands an adjudication of a new question, on new facts occurring after the entry of judgment. As regards these facts, and the adjudication upon them, the final order (as Judge PRATT says) is in the nature of a judgment. In this view the appeal is in time.

Nor can we now, on this motion pass on the merits of the application. It is true the court, at special term, held that the party failed to make a case of fraud entitling him to the relief he sought, and the general term came to the same conclusion. But the appellant insists that the supreme court was in error in that determination, and demands that it be corrected by this conrt. This question will be determined when the appeal shall be heard on the merits. In that regard it is enough that the party made a case requiring the application of legal or equitable principles to its determination.

Motion to dismiss the appeal is denied.

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SUPREME COURT.

MATHEW W. STEWART agt. JACKSON S. SCHULTZ and others, Commissioners of the Metropolitan Board of Health; THOMAS C. ACTON and others, Commissioners of the Metropolitan Police, constituting The Metropolitan Board of Health.

Where an action is brought against *public officers* (Board of Health) to restrain them by injunction from doing a threatened or anticipated act, alleged to be injurious to the plaintiff—the plaintiff neither claiming to recover damages, nor asking for relief, either by reason of acts done or omitted, it does not come within the statute allowing *double costs*, where the defendants succeed in the action. (*Affirming decision S. C. at Special Term, 33 How. 3, and concurring in Judge INGRAHAM's views on this point.*)

The statute giving *double costs*, when adopted, applied exclusively to actions and proceedings in courts of law, and not to suits in equity; consequently it is not applicable to actions of purely equitable cognizance.

New York General Term, October, 1867.

Before LEONARD, P. J. FULLERTON and J. C. SMITH, Justices.

AN injunction was granted restraining the defendants from interfering with or hindering the plaintiff in his business, and the defendants severed in their answer. The injunction was subsequently dissolved, and the action discontinued on payment of taxable costs. The clerk, on taxation, disallowed the costs of the police commissioners, but allowed double costs and double disbursements to the attorneys for the sanitary commissioners.

The plaintiff and the police commissioners appealed from the adjustment of the clerk to the special term. It was there decided by INGRAHAM J. (33 *How. p. 3*), that the clerk was right in refusing to tax more than one bill of costs; that the defendants sued as the board of health, could not sever so as to be entitled to two bills of costs, and that the statute allowing double costs to a public officer for official acts, applies only to actions brought for an act done, or for an omission to

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do an act in the line of his duty, and not to a proceeding where no damages were sought or relief asked, either for acts done or omitted.

The defendants appealed from the order directing a retaxation, and denying double costs.

ABRAHAM R. LAWRENCE, JR., *attorney for plaintiffs.*

GEORGE BLISS, JR., *attorney for Sanitary Commissioners.*

By the court, JAMES C. SMITH, J. I think this case is not within the statute giving double costs, or taxed costs and one-half thereof in addition. (2 R. S. 617, § 24, sub. 1.)

1st. The only actions against public officers to which the statute applies, are those brought for some act done by such officer by virtue of his office, or for the omission by him to do some act of which it was his duty to perform. The only purpose of the present action was to restrain the defendants from doing a threatened or anticipated act, alleged to be injurious to the plaintiff. The plaintiff did not recover damages nor ask for relief, either by reason of acts done or omitted; he sought to prevent certain official action, contemplated by the defendants. Such a case is not within the statute. This was the ground on which Justice INGRAHAM disposed of the question at the special term, and I fully concur in it.

2d. I think the statute when adopted, applied exclusively to actions and proceedings in courts of law, and not to suits in chancery, and, consequently, it is not now applicable to actions of purely equitable cognizance.

I am in favor of affirming the order.

LEONARD, P. J., concurring.

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N. Y. SUPERIOR COURT.

JANE FERRERO agt. GEORGE BUHLMAYER and others.

Where the articles of a *copartnership* prescribe a specified period of its continuance, no one of the partners can, by any purely voluntary act or acts done by him, work its dissolution.

Such acts may be sufficient to authorize a *court of equity* to decree dissolution on the application of the other partners; and that court may on the application of even the party committing such acts, notwithstanding such commission by him, decree a dissolution, if there are other causes justifying it, and it would be for the benefit of the partnership itself.

A purely voluntary *assignment* made by a partner, of his share and interest in a partnership, limited to continue for a specified period, does not of itself dissolve the partnership, nor furnish a cause for which a court of equity will, on the application of the assignor, or of the assignee, decree a dissolution against the consent of the other partners.

But an assignment made *bona fide*, by such partner in failing circumstances, to secure or pay debts due by him, is not to be regarded as a purely voluntary one within this rule.

The powers of partners in reference to dissolution of partnerships, fully discussed.

Special Term, July, 1867.

MOTION to vacate injunction.

FRANCIS BYRNE, for plaintiff.

GOEPP & STERN, for defendants.

JONES, J. Upon the argument of this motion, I was strongly of the opinion that the bare fact of a voluntary assignment by one partner, of his interest in the partnership, could not operate in his favor, or that of his assignee, as a dissolution of a partnership, which by the terms of the articles, was to continue a specified period.

Upon examination, however, I do not find the law on this subject to be so clear as I had supposed it to be.

The first inquiry is, can one partner, by his own voluntary act, dissolve a partnership for a specified term, before the expiration of the term?

Justice STORY, in his *Treatise on Partnership* (*Story on Part. § 275, et seq.*), and Justice WASHINGTON, in *Pierrepont agt. Graham* (4 Wash. C. C. 234), lays down the doctrine that they cannot. It is said the opposite doctrine is held in *Kitchen*

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agt. Clerk (6 J. R. p. 144); Marquand agt. A. T. Manufacturing Company (17 Id. p. 525, cited from p. 535), and Skinner agt. Dayton (19 Id. p. 513, cited from p. 538). KENT, in his *Commentaries* gives both views—adds one reason in favor of the latter, but does not undertake to decide between them.

The cases in *Johnson*, cannot be regarded as authorities in point on the question.

In the first case, the partnership, by its articles, was to continue until the 1st May, 1807, and on that day, if both parties concluded to continue the business, each partner was to add to the stock in cash \$2,500. But if it was thought best to close the concern, the goods on hand were to be sold, &c. The partnership continued until May 1st, 1807. After that day the business was continued, neither party advancing any money, until the 22d June, 1807, on which day one of the partners made an assignment of all his right and interest in the partnership property and debts, as security for a demand against him. There was no evidence of any agreement to continue the partnership for a specified period after May 1st, nor was there any evidence of any agreement to close the partnership, but the condition on which the partnership was to continue, viz: the advance of money by each partner, was not complied with by either.

Thus, after the 1st May, 1807, the partnership became one at will, and was such on the 27th June, when the assignment was made.

Consequently, when the court says the assignment of itself was a termination of the partnership, it only affirms the settled doctrine that a partnership at will can be dissolved by an assignment by one partner of his interest.

In the second case, the partner making the assignment was in failing circumstances, and being indebted to his assignees in a large amount, made the assignment to secure them. Shortly after, the assignor failed, and became utterly insolvent. The court, after referring to the English rule, that an act of bankruptcy is a dissolution of partnership, holds that an assign-

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ment made *under the circumstances of the one in question, would produce the same result.* All that this case in substance holds is, that when the financial condition of a partner is such that his creditors may, by a process of law, without fraud on his part, force a sale of his interest in the firm, an assignment made by him *bona fide*, to pay or secure his debts, and with the object of saving costs and expenses, and to put his property in such position as that his creditors may use it to the best advantage in payment of his debts, will not be deemed a voluntary act, because by this act he only effects that which his creditors could otherwise compel.

In the last case the point was not up for decision, but Justice PLATT, in his opinion (which is in favor of affirming one of the orders appealed from, and reversing the other), in commenting on the sixth article of the articles of association, for the purpose of showing that that article could not have been intended to secure to each stockholder the right of withdrawal at his pleasure, said, it could not be thus interpreted. "Because each partner would have had the same right, without any such provision. It is a right inseparable incident to every partnership. There can be no such thing as an indissoluble partnership.

"Every partner has an indefeasible right to dissolve partnership as to all future contracts, by publishing his own volition to that effect; and after such publication, the other members of the firm have no capacity to bind him by any contract. Even when partners covenant with each other that the partnership shall continue seven years, either partner may dissolve it the next day, by proclaiming his determination so to do; the only consequence being that thereby he subjects himself to a claim for damages for the breach of covenant."

But Chief Justice SPENCER, who arrived at the same conclusion as Justice PLATT, as regards affirmation and reversal, did not find it necessary in his opinion to assert this doctrine.

Thus the cases in the state stand. They do not appear me to be controlling, as authorities in point. It is necessary, how-

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ever, in determining the point in issue, to examine the reasons given by the learned judges in support of the affirmative of the proposition, as well as the reasons in support of the negative.

Mr. Justice PLATT says, that every partner has an indefeasible right to dissolve the partnership. Yet, he says, that the consequences of his dissolving it will be to subject himself to a claim for damages for breach of his covenant. How the exercise of an indefeasible right can subject one to damages, is to me inexplicable.

Again, he says: "The power given by one partner to another, to make joint contracts for them both, is not only a revocable power, but a man can do no act to divest himself of that power."

As this power is one of the essentials of a partnership, it follows from the proposition that no partnership for a limited term can be entered into, because no one of the partners can give this power to the other partners to be exercised during that limited time. All partnerships would become partnerships at will. This doctrine is opposed to the well settled law that there are two kinds of partnership which may be entered into: the one a partnership at will, the other a partnership for a term. (*Collyer on Part.* § 105; *Bouvier's Institutes*, §§ 1489, 1490.)

KENT says: "Such power of dissolution, by the voluntary act of one partner, would seem to be implied in the capacity of a partner to interfere and dissent from a purchase or contract about to be made by his associates. But such interference and dissent never dissolved a partnership."

It is true that such interference and denial, may assume such proportions, as to call for the interposition of the aid of a court of equity, upon the application of the other partners.

In some cases such other partners may have an injunction restraining the commission of the acts (1 *Story's Eq. Juris.* § 669), and may in all cases of such serious interference, apply for a dissolution of the firm. If the court should be of opin-

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ion that the interference was sufficient to call for a dissolution, it would render a decree to that effect; otherwise, it would dismiss the bill.

And so, also, a court of equity will restrain a partner from violating the rights of the other partners, or his duty to them. (*Story on Eq. Juris.* § 669.)

But it has never been laid down, that I am aware of, that a partner, who by his own willful acts of dissent and interference, made with sheer intent to interrupt and disturb the course of business, could, having thus created a cause, for which the others might apply for a dissolution, himself come into court, and make his own wrongful acts a ground for equitable relief in his favor.

In some cases where the views of partners as to the mode of conducting business, honestly entertained by them, are so widely different as to render it impossible to carry on the business with that unanimity and concord, which is essential to success in the undertaking, and yet they cannot agree on a dissolution, each deeming that the other should give way to him, the court will, on the application of either, decree dissolution. But their differences of views do not of themselves work a dissolution, but only constitute a cause, for which a court of equity may decree a dissolution.

Thus, then, as the dissent or interference by one partner from the purchases or with contracts about to be made by the others, does not in itself make a dissolution, but only furnishes a cause, for which, according to the circumstances of the case, and parties applying for relief, a court of equity may decree a dissolution, it is difficult to see how the power of a partner to so interfere and dissent, can give color to the doctrine that he can by his own willful act, either dissolve the partnership without the aid of a court of equity, or furnish a cause for which such court would, on his application, grant to him a dissolution.

Chancellor KENT further says, that by the civil law each partner has the power to dissolve the connection at any time,

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notwithstanding any convention to the contrary ; that the civil law holds every such convention null, on the ground that it is for the public interest that no partner should be obliged to continue in such a partnership against his will, inasmuch as the community of goods in such a case engenders discord and litigation.

Assuming this to be a correct statement of the principle of the civil law, the necessary result from it is, that all partnerships are at will, whether they are in the articles expressed to be for a term or not. This doctrine did not obtain in England, whence all our unwritten law is derived, at the time of the revolution, nor has it, so far as I have been able to ascertain, obtained there since.

In looking at the decisions of the English courts, we find numerous cases where application has been made to the court of chancery for a dissolution of the partnership for various causes, and also find discussions in that court and adjudications, as to what causes will be sufficient to authorize a decree of dissolution, and what not. (*Bouvier's Institutes*, vol 2, pp. 120 to 125; *Story's Eq. Juris.* § 673, 673 a. 673 b.)

Now if the principle obtains, that any partner has a right to dissolve the partnership by his own mere will, I cannot perceive the necessity of going to a court to procure a dissolution, although after the dissolution it might be necessary to go there to wind up the affairs, nor can I perceive what necessity there could be for any discussion as to what cases would be sufficient to decree a dissolution, nor how, in any case, the court could deny a dissolution.

It may be that the courts of England was of opinion that the reason for the rule of the civil law, as above laid down, was inadequate for its support, or that the advance of commercial enterprises rendering it necessary for the carrying on of a large commerce, that numerous and large partnerships of some permanency would exist, made it more beneficial to the public interest not to allow partnerships for a term to be broken up by the mere will and caprice of one of the part-

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ners, than it would be to allow them to be so broken up for the purpose of escaping the discord and litigation that might arise between the parties to the contract, or that the civil law as correctly expounded, did not allow a partnership for a fixed term to be broken up at the mere will of one of the partners.

Whatever may be the reason, I think it clear that the principle of the civil law, as above laid down, never obtained in England, and as our unwritten law is derived from that country, we should follow the principles that obtain there, unless there are strong reasons to the contrary.

But Judge STORY, in his *Treatise on Partnership*, gives a somewhat different view of the civil law. He says, "that law in case of partnership for a limited period of time, properly construed, does not justify or allow one partner to dissolve it at his mere pleasure, within that period, but on the contrary, it annexes to the right a positive condition that it shall be for a just cause, and under reasonable circumstances; and, moreover, it is limited to cases where it is for the benefit not of the particular partner, but of the partnership itself, that it should be dissolved; otherwise it is deemed unreasonable." Under this view, the civil law is substantially the same as the law of England, and as I understand it, of this country. It is necessary there should be some tribunal to determine what in any particular case, is a just cause for a dissolution, or what would be reasonable circumstances under which to dissolve, or whether the dissolution proposed be for the benefit of the partnership. Therefore, the court of chancery of England, at an early day, drew to itself the jurisdiction to determine whether such a partnership should be dissolved or not, and the jurisdiction then taken by the court of chancery of England, was after the revolution vested in the court of chancery of this state, and has ever continued to be exercised to this day. In exercising this jurisdiction, the courts have adopted the general principles of the civil law as expounded by Judge STORY, to wit: "That to authorize a dissolution, there must exist a just cause; it must be for the benefit of the

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partnership itself, and must be under reasonable circumstances."

The view taken by Justice STORY, of the civil law, must, I think, be taken as the correct one, inasmuch as the principles attributed by them to that law, have been recognized and acted on as correct principles, by the learned lawyers and judges of England, who lived at a time much nearer to the enunciation of these principles by the civil law than either Justice STORY or Chancellor KENT.

Moreover, I have been unable (the views expressed by the learned judge in the cases in *Johnson*, above commented on, to the contrary, notwithstanding) to perceive any good reason why parties should not be allowed to enter a partnership for a certain specified period of time; on the contrary, the present large and extended commercial interests would seem to require the formation of such contracts. Nor do I perceive any good reason why, having entered into such contract, a party thereto should, before the expiration of the time, be allowed to put an end to it by his own mere will and caprice, any more than he can be allowed in such manner to put an end to any other contract. As to the suggestion that discord and litigation would ensue if partners were not allowed to dissolve their connection at pleasure, the court of chancery has ample power to apply a correction by way of injunction, and when necessary, by a decree of dissolution. This is the proper forum to which to intrust the corrective, and not to the individual members of a firm to exercise by way of a dissolution, at their mere whim and caprice. Besides, it is very questionable, whether the disadvantages to ensue from establishing the principle that notwithstanding the agreement that the partnership should continue a specified period, any partner may, at his option, without any cause therefor, dissolve, it would not overbalance the disadvantages suggested as resulting from the opposite principle.

I have above stated that partnerships, with reference to their duration, are divided, with two classes, of partnership

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at will, and partnership for a term, and cited in support of the statement *Collyer on Partnership*, and *Bouvier's Institute*. As some portions of the above reasoning are based on the existence of this distinction, it may be well here to remark, it is also supported by the civil law, as expounded by Justice STORY, and by the recognized jurisdiction of courts of equity, to entertain bills *for the dissolution*, (not merely for a winding up *after dissolution*) of partnership, since, if when articles of copartnership prescribed a fixed time for the continuance of the partnership, any one of the partners might, of his own mere will, without the aid of a court dissolve the partnership, all partnerships would be at will, and a jurisdiction to decree a dissolution would never have arisen, because there could have been no occasion for it.

The case of a voluntary destruction of the whole subject matter of the partnership, and of the marriage of a *feme sole*, may be mentioned as instances where a voluntary act dissolves a partnership.

These cases are exceptions to the general rule, and are founded on special reasons applicable to them.

In the first case, when the subject matter of the partnership became extinct, no matter by what means, the life of the partnership is gone, for there remains nothing for it to act upon.

In the second case, it is probable that the marriage of a defendant would no longer operate as a dissolution, since under the existing law a married woman may carry on business separate from her husband. At the time when it did operate as a dissolution, the legal existence of the woman became suspended during marriage, or at least became incorporated and consolidated with that of the husband. In a legal point of view she ceased to exist, and as there can be no partnership between parties, one of whom is not in existence, it must terminate when one of the parties cease to exist.

For the same reason, the suicide of a partner, although the

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death is the result of his own voluntary act, will dissolve the partnership.

The conclusion on this branch of the subject is, that where the articles of partnership prescribe a specified period of its continuance, no one of the partners can by any purely voluntary act or acts done by him, work its dissolution under it, that so impair the physical or intellectual system, as to deprive the partner from giving the personal attention required by the articles, but such acts may be sufficient to authorize a court of equity to decree dissolution on the application of the other partners, and that court may, on the application of even the party committing such acts, notwithstanding such commission by him, decree a dissolution, if there are other causes justifying it, and it would be for the benefit of the partnership itself.

The next point of inquiry is, whether a purely voluntary assignment by one partner, of his right and interest in copartnership limited to continue for a specified period, is not such an act, as notwithstanding its voluntary character, dissolves the partnership. The learned judge in *Marquand* agt. *N. Y. Manufacturing Co.* (17 J. R. 538), is of opinion that it is because in his view it brings in interests which are incompatible with the carrying on of the business as originally organized, and because so that the assignee is according to acknowledged principles entitled to a division of assets if he insists on it.

With all due respect to the opinion of the learned judge, I feel obliged to differ.

The question is, what has a partner the right to transfer by an assignment, for it is clear that he can pass to his assignee only such interests and powers as he has a right to transfer.

It necessarily results from the doctrine that a partner cannot by his purely voluntary act dissolve the partnership, or make such act cause for a decree of a dissolution in his own application, that he cannot transfer any such right. It is also evident that he cannot transfer those rights, powers and duties,

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which by the partnership connection, he is bound to exercise and perform personally, for the benefit of the partnership itself, nor can he transfer any right or power, the exercise of which would be antagonistic to the partnership articles.

He can by such arrangement, transfer only his interest in the goods and profits, subject to all the equities, but can transfer none of his personal rights, powers and duties. What are the equities, subject to which the assignee takes?

He takes subject to the covenants and contract existing between the partners. Among these covenants are :

1st. That the goods and assets shall remain under the control, and in the possession of the partners; and as the debts due the firm shall be collected by, or the debts due from the firm paid by the partners, consequently the assignee is not entitled to participate in such control and possession, or to interfere in the collection or payment of such debts.

2d. That the goods and chattels shall be sold by the partners in the usual course of trade, and the proceeds thereof, and other assets, used by the partners in the legitimate prosecution of the business during the term of the partnership.

Therefore, the assignee takes no right to sell or dispose of the goods, or to insist on their sale, otherwise than in the legitimate prosecution of the business, and no right to insist upon the payment to him, or otherwise, of any portion of the proceeds, or of the other assets, except as provided for by the contract, and no right to insist on the application of the proceeds of the goods sold, or other assets, in a manner contrary to the contract, or in any one particular manner, in preference to several authorized by the contract.

3d. That all the partnership matters shall be under the control and supervision of the partners.

Therefore, the assignee takes no right to participate in such contract or supervision. These various matters are attached to the persons of the partners, and although a partner may assign the pecuniary interest, yet he cannot assign the personal rights. It is like unto a contract for personal services,

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which cannot be assigned without the consent of the employer, so as to enable the assignee to perform the service and receive pay therefor, yet the emolument may be assigned, so that when earned by the employee it may be recovered by the assignee.

There is nothing to prevent a partner who has assigned his share or interest, from still continuing to perform these duties, and exercise the powers attached to his person, which are to be performed and exercised for the benefit of the partnership.

While on the other hand he transfers to his assignee those rights and powers which he may exercise for his own individual benefit, and among them a right to call for an account according to the terms of the partnership contract, a right to demand a dissolution for such causes, and under such circumstances as he himself could, and a right upon the dissolution of the partnership by efflux of time, to apply to the court to wind up his affairs.

Under this construction of the effect of a voluntary assignment made by one partner of his share, there is no new element imported into the partnership, and no right in the assignee to demand an immediate division of the assets.

There is no hardship in this upon the assignee. One who purchases such an interest from a partner, must take *cum onere* the obligations resting in that partner.

The case of one who takes an assignment to secure a debt due him, stands on other grounds, and will be considered hereafter.

But it may be urged that such an assignment deprives the partnership of an essential element, to wit: the personal services of the assignor. That may be the element in some partnerships, and in some not. But it does not necessarily deprive the partners of those services, if after the assignment the assignor declines to give his personal services, it is his voluntary act, and as has been held above, no mere voluntary act by one partner will of itself dissolve a partnership for term, or be a cause for a decree of dissolution, on the appli-

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cation of the one doing the act, so this voluntary act will not have such effect, or be such cause.

The doctrine thus contended for, seems consistent with the principles of law, equity and justice, especially with the principle that no man can take advantage of his own wrong.

A voluntary dissolution of a partnership for a term, by one partner, is confessedly a wrong done by him to the others; to allow a voluntary assignment to have that effect, and give a right to an immediate winding up of the affairs of the firm, is to allow a right which did not otherwise exist, to be by the commission of a wrong gained in favor of the party committing the wrong, or those claiming under him.

The case of *Marquand agt. N. Y. Manufacturing Company* (17 J. R. 535), has been referred to as antagonistic to this doctrine, but on inspection it will be found to comport with it.

The circumstances of that case have been recited above, and the ground on which the decree properly rests, stated in another connection. But it is as well to advert to them again in this connection.

There the assignor was in failing circumstances, was largely indebted to the assignee, and made the assignment to secure such indebtedness. Shortly after the assignor failed, and subsequently became insolvent. It will be observed the decision is carefully limited to this precise case. The court says: "An assignment made by the party himself, *under circumstances like the present*, produce the same result." *Quere.* What is the same result? This is answered by referring to the previous section in the opinion. The court has referred to the English law, that a partnership is dissolved by an act of bankruptcy by one of the partners, because the assignment severs the interest of the bankrupt by operation of law. In analogy to this law, the court held that "an assignment *under circumstances like the present*," worked a dissolution.

An assignment under the English bankrupt act, is in its nature a compulsory one, for the appropriation of an insol-

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vent's property to the payment of his debts. The principles relating to voluntary assignments, do not apply to such an one. But others, at different times, became applicable. Those as that a partnership connection for a specified period, cannot be allowed to obstruct the course of justice by preventing the immediate subjection of the property of a debtor to the payment of his debts by due process of law. That the creditors have a right to such immediate application, superior to the right of the other partners to retain it with the view of realizing further profits, and the inferior right must yield to the superior one.

Such assignee takes the share discharged from all duties and obligations, which the assignor owes to his partners, other than such as exist in favor of another class of creditors, as well as the copartners; that is copartner creditors; including perhaps the other partner, if they have claims arising out of a breach of his trusts by the assignor.

Such assignee, then, thus taking the share of his assignor, and being authorized by the law under which he acts, to convert such share as speedily as possible, and distribute the proceeds among the creditors of the assignor, the assignment must necessarily operate to dissolve the partnership.

An assignment by a failing partner to his creditor, to secure debts due him, is not, it is true, strictly a compulsory assignment, but courts may well apply to such an assignment the same principles which govern compulsory assignments. The creditor by process of law, could subject the partner's share to the payment of his debt, and then dissolve the firm, inasmuch as he could thus by compulsory means secure payment of his debt, and in so doing dissolve the firm, there is no substantial reason why he should not be allowed to effect the same object by an assignment and bill to dissolve.

The distinction between a purely voluntary assignment, and the assignment made under a pressure of a necessity to pay or secure creditors, arises from the differences in the powers of the assignor. In the one case his powers are cir-

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cumscribed and restricted by the partnership connection, while in the other that connection is itself made by the law to give way in favor of creditors.

I have, therefore, arrived at the conclusion that a purely voluntary assignment made by a partner of his share and interest in a partnership limited to continue for a specified period, does not of itself dissolve the partnership, nor furnish a cause for which a court of equity will, on the application of the assignors or of the assignee, decree a dissolution against the eonsent of the other partners, but an assignment made *bona fide* by such partner in failing or embarrassed circumstances to secure or pay debts due by him, is not to be regarded as a purely voluntary one within this act.

In the case at bar, the assignment cannot be regarded as a cause for a dissolution. The action is brought by the assignee, and the assignment appears to have been purely voluntary, and to have been made to carry out a purchase of the assignor's interest, upon a purely voluntary sale thereof.

We must, therefore, inquire whether there are any causes set forth in the complaint, for which the assignor would have been entitled to a dissolution.

The causes alleged are :

1. That defendants have not since February, 1867, rendered to the assignor any account of the business transactions or condition of the partnership.
2. That defendants have not taken or exhibited to the assignee any account of the stock, or of the profits and losses of the partnership, and have not distributed to her any of the profits.
3. That defendants have appropriated a large amount of the proceeds of goods of the firm sold by them to their support and maintenance, and still continue to do so.
4. That one of the defendants denied the plaintiff's right to an interest in the partnership or property, and expressed himself as either unable or disinclined to give an account to the plaintiff, or doubting her right to call on him therefor.

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5. That the partnership is insolvent, and has permitted its obligations and notes to be protested.

6. That one of the defendants has declared his intention to dispose of the partnership property.

7. That defendants are wholly insolvent.

If these allegations are true, there is undoubtedly sufficient cause for distribution.

All of the allegations except the fourth, are, however made on information and belief, and are unsupported by any positive affidavit.

The defendants admit the first and second allegations, but they excuse the first by stating that the business was so small that comparatively but little was done; that the assignee was informed of this, and that consequently the sending of monthly statements was delayed until a remittance could be sent with them. As to the second, it appears that the assignment was made June 28, while by the articles the account was not to be commenced until June 30, therefore at the time of the assignment there was no violation of defendants' duty in this respect.

The not rendering an account to the assignee after the assignment, can scarcely be regarded as a cause for a dissolution in an action by the assignee, since she can call for an account to be rendered to herself. But even if it could be, a reasonable time after the 30th of June must be allowed to make out the account. This action was commenced July 20, and under the circumstances of the sickness of Mrs. Buhlmeier, the delay cannot be regarded as unreasonable.

These causes, under the circumstances, seem to me wholly insufficient to authorize a decree of dissolution.

As to the third allegation, by the articles of copartnership both defendants are entitled to receive their board, lodging and washing, and one of them a salary of about \$400. There is no allegation or proof that defendants are appropriating more of the partnership funds or assets, than are reasonably necessary for these purposes.

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The fourth, fifth and sixth allegations defendants positively deny, except as they had not seen the assignment to the plaintiff, they disputed her right to an account. Said dispute seems to have been *bona fide*; the plaintiff seems to have taken no steps whatever to satisfy them of her right, and under said circumstances, the non-recognition of her right cannot be sufficient cause for a dissolution. As regards the matters alleged on information and belief, and denied positively, of course no decree can be based on them. The solvency of the partnership seems to be clearly shown by the defendants.

The mere existence of a chattel mortgage on the furniture of the firm, does not necessarily make the firm insolvent, or in danger of becoming so.

Especially when from the nature of the transaction it would appear as if the money procured on that mortgage was loaned to the plaintiff's assignor, to buy out for her own benefit the share of a former partner, and used by her for that purpose, whereby she (of whose solvency there is no question) became indebted to the firm for that amount.

The remaining charge is that the defendants are insolvent. This is made on information and belief. I find no denial of it in the defendants' affidavits. Of course, if defendants had not undertaken to answer the allegation against them, no order could be made upon allegations resting on information and belief only. But when defendants undertake to answer allegations against them, and answer some, but omit to answer others, there is ordinarily a presumption that those omitted are not answered because they are true. But the circumstances of this case so weaken this presumption, that I do not feel authorized to sustain the injunction on the strength of it.

The plaintiff has made on information and belief, many serious charges against the defendants, which have been met positively and clearly by defendants.

This shows either that her information has been very incorrect or that she is very credulous, and pins her belief on very scanty and inadequate information.

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This detracts materially from even the little force due to allegations on information and belief.

Again, the papers show that the value of each defendant's interest in the partnership, over and above partnership liabilities and debts, is in one place about \$1,700, and in another about \$2,600, and this, together with the fact that they have been carrying on business at the same place in this city under the name of one of the defendants for the space of two years, leads to the belief that the plaintiff's allegation is incorrect, and that the omission to deny it is a mere oversight.

As, however, there is a possibility that the plaintiff's allegation is true, I shall deny the motion to dissolve, unless defendants within two days file affidavits denying the plaintiff's allegation of their insolvency.

In conclusion, I may state that as there seems to me to be no just cause for dissolution (providing the affidavits required are filed), and no reasonable apprehension that any loss will happen from acts done by defendants in violation of the partnership agreement, and as from the papers it appears that a dissolution and sale at present would be prejudicial to the interests of the partnership, I feel less repugnance in holding that the assignment does not of itself dissolve the partnership, or furnish a cause for its dissolution on the application of the assignee.

Injunction dissolved upon defendants filing affidavits' denying the allegation of their insolvency, without costs, but if they fail to file such affidavits, the motion to dissolve the injunction is denied, with \$10 costs.

Order to be settled on two days notice, and injunction to be continued until its settlement.

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NEW YORK COMMON PLEAS.

THEODORE STUYVESANT agt. THOMAS BOWRAN.

In an action of *crim. con.*, where the arrest of the defendant is based upon the nature of the action itself, and not upon extrinsic circumstances, and is supported by affidavits, it is not the rule of this court to vacate the order upon affidavits introduced by the defendant denying that there is a cause of action ; as it would be trying the merits in advance upon *ex parte* affidavits.

There might be such a clear case made on a motion to discharge from arrest, as would justify a judge in vacating the order of arrest, although it would be virtually a disposal of the merits of the action ; but it would be only in a case removed from all doubt, and upon a state of facts which would justify the judge to non-suit at the trial.

Special Term, October 29, 1867.

MOTION to set aside order of arrest. or reduce amount of bail.

EDWIN JAMES and GEORGE SHEA, *for motion.*

STEPHEN WHITEHORN, *attorney,* and

ALTERED A. PHILIPS, *counsel for plaintiff.*

VAN VORST, J. The complaint in this action charges the defendant with having had carnal knowledge of the plaintiff's wife, and the action is brought to recover damages for the wrong, to the amount of twenty thousand dollars. The action was commenced in October, 1867. An order of arrest was obtained, and the defendant held to bail in the sum of five thousand dollars, under which he is now arrested and held in custody. The order of arrest was obtained upon the complaint and two affidavits, one made by the plaintiff himself, in which he alleges that the criminal intercourse of which he complains, occurred at his own house, in the year 1863, but that he did not discover it until about the month of May, 1867.

The other affidavit was made by one Lawrence Sullivan, a lad now absent, seventeen years of age, who swears to

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having been a witness of the criminal intercourse at the time of its occurrence. He was then about thirteen years of age.

From the affidavits, it appears that the plaintiff's knowledge of the offense was derived by him from the statements of Sullivan, and then only some four years after its commission. It appears that Sullivan was at the time an errand boy in the office of the plaintiff, and lived in plaintiff's house, but left plaintiff's employment in 1864, and lately, and in May last, made to plaintiff the revelations contained in his affidavit, of the particulars of the reported guilt of the wife, and the offense of the defendant.

Defendant is a widower, brother-in-law of the plaintiff, having married plaintiff's sister, for some years past deceased. He was also a resident in plaintiff's house in 1863, at the time he is alleged to have been guilty of the offense charged. The criminal conversation is alleged to have been committed so publicly as to have been witnessed by this boy, no efforts or precautions having apparently been used by the parties to conceal their crime. Why there was no earlier communication made by this witness to the husband of the offense, is not stated, which is the more remarkable, if the boy's mind was impressed with a sense of the guilt of plaintiff's wife and defendant; as the plaintiff claims in his affidavit to have taken the lad in his office and house from considerations of kindness and mercy, and that the boy was forced to leave him on account of the cruel treatment of his wife.

In support of the motion to vacate the order, an affidavit was read, in which defendant denies most explicitly the allegations contained in the affidavits upon which the arrest was granted.

Other matters appeared in the affidavits, which are not important to be considered in the decision of this question.

The counsel for the defendant earnestly claim that there is not sufficient proof contained in the affidavits produced by plaintiff of the commission of the offense by the defendant, and that the positive denial of the defendant should avail to

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overcome the effect of the affidavit of Sullivan; that the statements of Sullivan are so improbable, that the defendant's denial, in connection with other circumstances, entitle him to be discharged from arrest, or in any event for an order reducing the amount of bail.

Offenses of the character charged in the complaint are always difficult to be established by complete and overwhelming proof; still there should always be such evidence adduced as to satisfy the court that the defendant is guilty. The evidence, while it points out the offense, should be credible. That the circumstances are improbable, however, is no answer to a sworn statement of an occurrence made by a person claiming to be an eye-witness, whose testimony is unimpeached. Many improbable things do actually occur in life, within the experience of all, and the force of testimony is not to be avoided by an argument based only on the seeming improbability of the statement, nor can much weight be given to a mere denial of the charges, made by the defendant. If capable of committing this offense, and that, too, under the roof of the brother of his own deceased wife, he would be quite likely to deny it. But, in cases of this character, where the arrest is based upon the nature of the action itself, and not upon extrinsic circumstances, and is supported by affidavits, it is not the rule of this court to vacate the order upon affidavits introduced by the defendant, denying that there is a cause of action, for that would be trying the merits of the action in advance upon *ex parte* affidavits. (*Solomon* agt. *Wass*, 2 *Hilton*, 179.) There might be such a clear case made on a motion of this character, as would justify a judge in vacating an order of arrest, although it was virtually a disposal of the merits of the action, but it would only be in a case removed from all doubt, and upon a state of facts which would justify the judge to non-suit at the trial. But this is not a case of that character. (*Lewis* agt. *Noble*, 15 *Abb.* 475; *Barnett* agt. *Gracie*, 34 *Barb.* 20.)

The motion to vacate the order of arrest is, therefore,

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denied. Nor do I think the amount of bail should be reduced. The amount fixed is moderate in the light of the offense charged; it is not oppressive, and there is no reason to believe that it is beyond the ability of the defendant to furnish.

Motion denied.

COURT OF APPEALS.

THE OGDENSBURGH, CLAYTON AND ROME RAILROAD COMPANY,
appellant agt. WILLIAM W. WOLLEY, respondent.

In subscribing for stock of a railroad company under the statute, there must be both a subscription and payment of money—ten per cent, to make a binding contract; but these acts need not be simultaneous, the statute being satisfied, and the contract of subscription complete by a subsequent actual payment or receipt of the money. And the subscription cannot depend for its validity or invalidity, upon the fact whether the statute has been complied with in the payment of the ten per cent, willingly or unwillingly, by the subscriber.

If the directors of the company do not exact the money, and the subscriber omits to pay at the time of subscribing, it is the doctrine of former cases in this court that the contract remains incomplete, and of no binding force. If, however, the money be subsequently paid, the statute is complied with.

It seems, that as an original question, a subscription for stock under this statute, with out the payment of any money, would be valid and binding on the subscriber.

September, 1864.

APPEAL from order of supreme court granting new trial, with stipulation for final judgment. The action was brought to recover sundry instalments alleged to be due upon a subscription, by the defendant, of \$700 to the capital stock of the plaintiff. The defendant, in his answer, denied that he ever became a subscriber to the capital stock of said corporation, or that he ever paid the sum of \$70 to the directors of said corporation or plaintiff, or that he ever paid, or became liable to pay, any sum whatever, either as or for the first ten per cent, or as and for subsequent instalments.

The cause was referred to the Hon. WILLIAM J. BACON, who ordered a judgment for the plaintiff for \$333.16.

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The following are the referee's findings of fact and conclusions of law:

The plaintiff was organized as a corporation, as alleged in the complaint, that thereafter, and some time in the fall of 1853, the defendant subscribed for \$1,000 of the stock of the plaintiff, such subscription being made while the subscription book was in the hands of Alanson H. Barnes, a director of said company, duly authorized to receive the same; that nothing was paid upon said subscription at the time, but the defendant gave his promissory note to said Barnes for \$100, as and for the ten per cent required at the time of subscribing; that subsequent to this, and in the summer of 1854, an arrangement was made by said Barnes, by which the subscription of said defendant was agreed to be, and was reduced to the sum of \$700, and the defendant's name was entered on the plaintiff's books as a subscriber for \$700 of stock, and in the month of July, 1854, and again in September, 1854, the defendant gave two negotiable promissory notes, in which were embraced and included the original ten per cent, and the several calls which had been made and were due upon said stock, down to, and including the call due and payable on the 1st of August, 1854, and the note of \$100 was thereupon surrendered to the defendant; that the said notes, before their maturity, were negotiated to, and discounted by, the bank of Lowville, by which bank they were owned and held at and after maturity; that subsequently suits were brought upon said notes in favor of said bank; that the defendant employed an attorney, and put in an answer to said suits, but before the time of the trial, becoming satisfied that the bank had discounted the notes without notice, and in the ordinary course of business, he abandoned the defense, and judgments were taken upon the notes, which judgments the defendant subsequently paid, and thus both notes were satisfied and paid; that calls were made by the plaintiff for payments upon said stock, as alleged in the complaint, of which defendant had due notice, and that he has neglected and refused to

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pay the several calls due and payable on the 1st of November, 1854, the 1st of February, 1855, the 1st of November, 1855, and the 10th of November, 1857.

On these facts the referee's conclusions of law were, that the defendant is not discharged from his subscription by the omission to pay ten per cent in cash at the time of subscribing, but that the giving of the notes, which included the ten per cent and the subsequent calls, and the payment thereof operated as a waiver of any right he might have had to repudiate his subscription, and was a ratification thereof, and an assent to be bound by it as an existing and continuing liability; and that the plaintiff is accordingly entitled to judgment for \$333.16, being the amount of the four calls above mentioned, with interest from the date of each call, respectively.

Judgment being entered on the report of the referee, the defendant appealed to the general term of the supreme court, where the same was reversed, and a new trial granted, with costs to abide the event.

From this order the plaintiff appealed, stipulating that if it be affirmed, a judgment absolute may be rendered against the company.

J. H. REYNOLDS, *for the plaintiff.*

E. A. BROWN, *for the defendant.*

WRIGHT, J. The defendant became a subscriber to the plaintiff's capital stock, but at the time of subscribing did not pay ten per cent in money. Subsequently, by agreement, the original subscription was reduced from \$1,000 to \$700, and on two occasions he gave to the company two negotiable notes, in which were embraced and included the original ten per cent, and the several calls which had been made, and which were due and payable upon the stock down to the 1st of August, 1854. These notes the defendant afterwards paid. Before their maturity they were discounted for the railroad company by the bank of Lowville, and subsequently

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suits were brought by the bank upon them, judgments taken again by default, and the judgments satisfied and paid by the defendant. Thus there was an actual payment of the original ten per cent, and three several subsequent calls or instalments of ten per cent each. After forty per cent had been paid on the subscription, the defendant, in an action to recover further instalments, alleges as a defense that such subscription is invalid, and he is not bound by it because of his omission to pay ten per cent in cash contemporaneously with the act of subscribing.

If the statute not only requires a subscription on the books of the company, but that such subscription should be attended by a cash payment of ten per cent, to make a valid contract, and one binding on the parties, the defense must succeed. On the contrary, if a contemporaneous cash payment was not necessary to the validity of the subscription, or was not a condition precedent to the defendant's liability attaching ; or if the subsequent payment of ten per cent, voluntarily or involuntarily, so that the company actually got the money, invested the defendant with all the rights of a stockholder in the plaintiff's corporation, and he could have compelled a delivery of the stock to him when the action was brought, there is no defense. If he ever became a stockholder, he could not repudiate his obligation to pay for the stock for which he had subscribed ; and if, as was doubtless the case, the object of the statute requiring a subscriber to pay ten per cent in cash on the amount subscribed, was to secure money to the plaintiff on a subscription to its stock, it was fully accomplished in the present case. The money, it is true, was not paid simultaneously with the subscription, but it was afterwards realized by, and went into the treasury of the company, and I am unable to see why the subscription would not at least be valid and binding, from the time the money was realized, which was before the commencement of the suit. It could only be otherwise upon the ground that to make a valid and obligatory contract for stock between the company and the

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subscriber, the statute imperatively requires two things to be done, viz: a subscription and payment by the subscriber of ten per cent of the amount subscribed by him *in cash at the time of subscribing*; and that unless the subscription and payment are simultaneous, though the ten per cent may be subsequently paid, and the money realized by the company, no liability attaches to the subscriber. This position I consider untenable, and it has been so regarded in at least two cases in this court.

In the case of *The Black River and Utica Railroad Company* agt. *Clarke*. (25 N. Y. R. 208), the defendant made no cash payment at the time of the subscribing. He subsequently paid forty per cent on the amount of his subscription, and then, as in this case, sought to defend an action to recover further instalments, on the ground of the invalidity of the contract, because of the omission to pay the ten per cent in money at the time of subscribing; but the court held, that after the actual payment of forty per cent on the subscription, the statute requirement on this point must be deemed fully complied with, and the defendant was bound by the contract.

In *Beach, Receiver* agt. *Smith* (a case not yet reported), the defendant paid no money at the time of subscribing. He had been acting for the company some three months before he subscribed, in July, 1853, and continued in its employ afterwards. On the 25th of February, 1854, he settled with the company, charging himself with the ten per cent, and also with another instalment of ten per cent, called for and payable on the first of February, 1854, and the company paid him the balance of his account. The court said: "It is sufficient that the ten per cent, or the first amount to be paid, has been subsequently paid, to render the subscription valid and binding upon the defendant. On the 25th of February, 1854, he in fact not only paid the ten per cent, but the first instalment called for, of ten per cent, payable on the first day of that month. He had, therefore, on that day paid twenty per cent on the amount of his subscription, and he cannot

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now be permitted to allege that it was not valid because he did not at the time of subscribing pay the ten per cent in cash."

The only distinction between these cases and the present is, that in the first case cited, the subsequent cash payments were made directly to the company by the defendant; in the second, no money was paid, but the defendant settled with the company, voluntarily charging himself in such settlement with the two instalments as so much money paid on his subscription, the company paying him the balance of his claim against it.

In the present case the defendant did not directly pay the money, but with the intent to effectuate his subscription, gave negotiable notes for three instalments, and also for the original ten per cent; and these notes he afterwards paid. When he gave the notes, he had not reached the point of attempting to repudiate his subscription. By giving them, he authorized the plaintiff to negotiate them, and apply the proceeds in payments upon his subscription; and this was done, and is the same in legal effect as if he had paid the money himself. It can make no difference whether the defendant afterwards paid the notes thus given willingly or not, so long as they were in fact paid. If there was an actual payment of the ten per cent, though the defendant may have afterwards made an ineffectual effort to get rid of the payment of the notes which supplied the plaintiff with the means of actually getting the money, the subscription would not be void. Certainly the validity or invalidity of a subscription to stock, under the general railroad act, cannot depend on the fact whether the statute has been complied with in the payment of the ten per cent, willingly or unwillingly, by the subscriber. A subscription cannot be valid when the money has been subsequently voluntarily paid, and invalid when there has been an actual payment—it may be against his will at the time the money is received. In the case cited, it was distinctly held that a subscription was not invalid, though there was an omis-

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sion to make the cash payment simultaneously with subscribing.

It was said that the intent of the railroad act was that no subscription should be valid until ten per cent in cash was paid thereon, and not that it should be invalid if the actual subscription and payment of the money were not simultaneous acts; that writing the name in the subscription book should be deemed but part of the transaction, and provisional or conditional until the ten per cent is paid; but after payment, and certainly after payment of forty per cent on the subscription, as in *Clark's* case, and twenty per cent thereon, as in the case of *Smith*, the statute requirement on this point must be deemed fully complied with. In both the cases, the contract was held to be binding on the parties, though at the time of subscribing no money was paid; in the one case, the party making a subsequent payment on his subscription of \$400, which was more than the ten per cent; and in the other the party never paying any money, but some eight months after subscribing, adjusting and discharging his demand against the company by crediting the latter with the original ten per cent, and a further instalment for the same amount, and receiving the balance due to him after deducting the two sums. The cases, in effect, decide that there must be both a subscription and payment of money to make a binding contract, but that these acts need not be simultaneous, the statute being satisfied, and the contract of subscription complete, by a subsequent actual payment, or receipt of the money. And why not? Every substantial object of the statute requiring a money payment of one-tenth of the subscription is answered by the corporation actually getting the money. If the purpose of the requirement be to secure money to the corporation on a subscription to its stock, such purpose is fully accomplished by the payment before or after the subscriber writes his name in the subscription book of the company. Can there be any doubt, but that after a subscription and actual payment in cash of the required sum, the subscriber

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becomes invested with all the rights of a stockholder in the corporation? Is he a stockholder, when the payment of money attends the act of subscribing, and not one, or having any rights as such, when the company omits to exact, and he to pay the ten per cent at the moment of subscription, but the corporation subsequently by his act in fact realized the money? Clearly not. When there has been a subscription unattended by the cash payment, the cases referred to hold that the contract is still imperfect and incomplete. It has no binding force by the mere act of subscribing.

The statute, it is said, requires the payment of ten per cent in money on the amount subscribed, and until that is paid there is no legal or obligatory contract. The subscriber may refuse to make the cash payment, and perfect the agreement for stock authorized by the statute. But if the statute be complied with, both in the subscription and actual cash payment of ten per cent, so that the corporation gets the money, though it may not have been paid or received at the time of subscribing, the contract is a valid and obligatory one. The subscriber becomes a stockholder, with the obligation upon him to make full payment for his stock, and with the right, upon such payment to compel a delivery of it to him by the corporation. When the corporation in this case got the original ten per cent, and the subsequent calls of thirty per cent, the defendant was clothed with all the rights of a stockholder in the corporation. He could not repudiate his obligations as such, nor deny his liability to make full payment for the stock for which he had subscribed. After subscribing, and voluntarily giving to the corporation the means of raising money to pay, not only the original ten per cent, but further instalments of thirty per cent, and the money had been actually received by the company to the extent of forty per cent of his subscription, it is absurd to pretend that he did not become a stockholder, or that his subscription was not binding upon him, because of the original defect in omitting to make the payment

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of ten per cent at the time of writing his name in the subscription book.

Assume that the statute requires a subscription and payment of this ten per cent in money, to concur to make a valid contract for the stock of a railroad corporation, and one that will bind the parties. If the directors do not exact the money, and the subscriber omits to pay at the time of subscribing, it is the doctrine of former cases in this court that the contract remains incomplete and of no binding force. If, however, the money be subsequently paid, the statute is complied with; its object is accomplished by the corporation realizing in money one-tenth of the amount subscribed; all is done that is required to be done to make a valid subscription. And if the contract be not valid and binding before, it must be after the money has been paid or realized by the corporation. In *Smith's* case nothing was paid at the time of subscribing, but eight months afterwards he did what was equivalent to a payment of the ten per cent. He paid it by off-setting against the amount his claim for services rendered for the company.

His subscription was held valid and binding upon him; and he was not allowed to allege the original defect in it, viz: omitting to make the cash payment at the time of subscribing, as a defense to further calls. In this case, the defendant subscribed, but he did not at the time pay the ten per cent in cash. He gave to the company two negotiable promissory notes for instalments, and also for the original ten per cent. These notes were negotiated to, and discounted for the company by the bank of Lowville, and in that way the corporation not only realized in cash the first ten per cent, but also three subsequent instalments of ten per cent each. The notes were afterwards paid by the defendant, it may be unwillingly, after he had been advised that he could avoid the subscription on the ground of its original defectiveness. This, however, does not affect the question of a compliance with the statute, by the payment of ten per cent of the amount of his sub-

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scription. The company actually got the money, and the defendant intended this result. The notes which he gave were in a negotiable form, and giving them in that form, he authorized and meant that the plaintiff should negotiate them, and apply the proceeds in payments upon his subscription. This having been done, the legal effect of the transaction was the same as though he had paid the money himself. At all events, there was a subscription, and by the subsequent voluntary action of the defendant, there was a payment to, and receipt by the corporation, not only of the original ten per cent, but three further instalments of thirty per cent. After this, it is quite too late to allege that the subscription is not valid and binding upon him. Conceding it to have been invalid before the ten per cent in cash was paid to or realized by the corporation, it was a valid subscription from the time the money was realized. If the original subscription was not binding upon the defendant, because of the omission to pay ten per cent in cash at the time it was made, his subsequent acts cured the invalidity. He became bound by it, and cannot now be permitted to allege the original defect in the subscription as a defense to further calls. I think, therefore, on the ground assumed by the referee, if on no other, his judgment was right.

It is, perhaps, unnecessary to discuss the point, whether the contract of subscription was not valid and binding, even without payment of the ten per cent in money. Uncontrolled by former decisions of this court, I should have been of the opinion that the contract was complete when the books were subscribed, and that it did not depend upon a payment by the subscriber of any portion of the amount subscribed, to give it validity, or binding force. The statute authorizes this corporation to contract for the disposal of its capital stock; it is empowered to open books of subscription, and to receive subscriptions until the whole amount is subscribed. There is thus authority to contract, and the mode of entering into the contract is distinctly pointed out. It is to be done by

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subscribing the books of the company. If there was nothing further, it would not be questioned that by subscribing, a valid contract, and one binding on the subscriber, would be effected for the sum subscribed; nothing would remain to be done to complete it; there would be an agreement to take and pay for the amount subscribed. This promise would be to the corporation, and good by force of the statute. The corporation would be bound to deliver the stock on payment being made. But the section of the railroad act, authorizing the contract, contains this provision: "At the time of subscribing, every subscriber shall pay to the directors ten per cent on the amount subscribed by him, in money; and no subscription shall be received or taken without such payment." (*Laws of 1850, chap. 140, § 4.*) Suppose, however, this provision is not observed—the subscriber omits to pay down the percentage, or the corporation to exact it—is there no valid contract, or rather none at all, by which a subscriber is bound? Is this a fair interpretation of the legislative intention? Was it the design of the provision to prohibit any contract for stock of a railroad corporation, unless there was a subscription and payment of a per-centge on the amount subscribed; or that where a party subscribes, he shall not be bound, if at the time of subscribing the directors omit to exact, and the subscriber neglects to make the money payment? I think not.

I do not think payment was necessary to complete the contract of subscription. The law does not declare a contract for railroad stock to be void, unless the party both writes his name and the amount he proposes to take in the books of the corporation, and pays down in cash ten per cent of his subscription; or that if he subscribes and omits to pay there is no binding contract, or no contract at all. The directors are forbidden to receive a subscription, without the payment of the ten per cent in money; but if they do receive it without exacting payment of the money, it is not declared that the contract entered into in the mode prescribed, viz: by sub-

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scribing the books opened by the company, shall be invalid, and bind nobody. The payment of the ten per cent is not, in terms, made a statutory element of a complete and valid subscription. The provision was obviously intended for the benefit of the corporation, and all that might become interested in its affairs, and I think might be waived at the request of the subscriber, without impairing his legal obligation arising out of his subscription. It is undoubtedly an illegality for the directors to receive a subscription without the payment of ten per cent in money, but such illegality does not enter into, or form a portion of the contract of subscription. It is rather incidental and collateral, and is not inherent in the contract, and forms no part of the consideration. The directors may be liable for a breach of duty ; but so far as the subscriber is concerned, his obligation to pay arises when he subscribes, and I think it remains until it is discharged by payment. A contract is not void as against a statute, unless founded upon an illegal consideration, which enters into and forms a part of the contract, or unless it provides for the doing of something distinctly forbidden. Neither of these illegal elements exists in a contract such as is involved in this case. It is lawful to subscribe and pay for railroad stock. It is the duty of the directors to exact, and of the subscriber to pay, ten per cent of the amount, at the time of subscribing. But if this be omitted, the contract remains unaffected, and the obligation to pay still exists, as the only thing forbidden is the omission to exact payment of the ten per cent at the moment of subscription.

Had, therefore, no money been paid to or realized by the plaintiff, I should, for myself, have been of the opinion that a subscription, such as is involved in this case, would be valid and binding on the subscriber. I can find no reliable authority to the contrary, before the two recent cases in this court referred to. These hold that a subscription is not enough, but that the ten per cent must be paid before there is a valid and binding contract, under the statute. Within the prin-

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ple, however, of these cases, the judgment of the referee was correct.

The order of the general term granting a new trial should be reversed, and the judgment of the special term affirmed.

Judgment reversed.

NEW YORK COMMON PLEAS.

CHARLES SCOTT agt. WILLIAM E. SCOTT SIMMONS.

Where goods are purchased upon credit through false representations of the vendee as to his pecuniary condition, the vendor may disaffirm the contract of sale and sue for the fraud. But he must offer to return the notes or securities taken from the vendee, as a consideration for the purchase. In such case the property is not changed, and no title passes to the vendee.

In an action for wrongful conversion of personal property a *warrant of attachment* may issue.

Where an attachment is sought upon the ground that the defendant has assigned or disposed of, or is about to assign or dispose of his property, with intent to defraud his creditors (*Code*, § 227), the facts should be such at least as to justify a deduction from them of such *fraudulent intent*.

Special Term, October 28, 1867.

MOTION to vacate warrant of attachment obtained under the 227th section of the Code.

W. A. BOYD, *for defendant, for motion.*

DUBOIS SMITH, *for plaintiff, opposed.*

VAN VORST, J. The plaintiff sold and delivered to the defendant a quantity of merchandise on credit, and took defendant's notes for the same at thirty, sixty and ninety days from date.

The purchase and delivery of the goods was effected by false representations on the part of defendant as to his pecuniary condition—he *misrepresented the amount of his indebtedness*. Plaintiff charges the misrepresentations to have been

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made by defendant with the fraudulent design of deceiving plaintiff, and inducing him to part with the goods.

The plaintiff offers in *his affidavits* upon which the attachment was issued, to deliver up the notes of defendant, to be, cancelled. The notes are not yet due.

The summons in this action is under the second subdivision of the 129th section of the Code, and is for relief.

The plaintiff seeks to disaffirm the contract of sale, and to sue for the fraud. This he may do.

Where goods are purchased upon credit, through false representations of the vendee as to his pecuniary condition, the vendor may repudiate the sale. (*Hitchcock agt. Covill*, 20 *Wend.* 167; 23 *Id.* 411; *Loyd agt. Brewster*, 4 *Paige*, 537.)

He must offer, however, to return the notes, as is done in this case. (*Baker agt. Robbins*, 2 *Denio*, 136.)

Under such circumstances the property is not changed, and no title passes to the vendee. (*Carey agt. Hotaling*, 1 *Hill*, 311.)

The goods may be replevied from the fraudulent vendee, or an action maintained against him for the conversion.

In an action for wrongful conversion of personal property, a warrant of attachment may issue. (*Code*, § 227, *amended 1866.*)

But the attachment in this case may be sustained for another cause, on the further facts disclosed by the affidavits upon which it was issued.

The goods in question were purchased about the 12th day of September, 1867, at which time defendant represented to plaintiff that his stock of goods was worth \$5,000, all paid for, and that the repairs on his store had cost \$2,500, which were also paid for.

On or about the 9th day of October, following, defendant claims to have disposed of all his stock of goods, with the lease of his store, to one Quinn, for \$3,000, receiving from him some \$2,000 in cash, and the residue of the purchase money was absorbed by the amount of his alleged indebted-

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ness to Quinn. The affidavit also charges that Quinn is a man of no pecuniary responsibility, and further, that notwithstanding the pretended sale, defendant still remains in possession of the goods, and conducts the business at the store as before the sale; Quinn's relation to the transaction being nominal and colorable only.

These acts constitute a disposal of his property by the defendant with intent to defraud his creditors, and they are expressly charged in the affidavits to have been resorted to for such purpose.

An attachment may issue in an action, when the defendant has assigned or disposed of, or is about to assign or dispose of his property, with intent to defraud his creditors. (*Code*, § 227.) Such fraudulent intent may reasonably be inferred from the acts and conduct of the party. The facts to warrant an attachment should be such as to justify a deduction from them of such intent, as they do clearly in this instance.

None of the allegations in the affidavit on behalf of plaintiff, are denied by defendant. He moves upon what he claims to be the insufficiency of the proof upon which the attachment was granted.

I think the facts sufficient to uphold the attachment.

Motion denied. Ten dollars costs to plaintiff, to abide event.

COURT OF APPEALS.

JOHNSON LITTLE, Administrator, &c., appellant agt. ALFRED DENN, respondent.

The question of a *right of way*, either public or private, is a question of *title to real property*, which a justice of the peace has no jurisdiction to try.

In an action for *obstructing a highway*, the question whether the alleged obstruction is within the *bounds of the highway*, is always open to proof by the defendant. It is a question that does not properly involve title, but is entirely distinct and separate from it. It admits title, and seeks only to define and fix the boundaries.

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June, 1864.

THE action was brought in a justice's court by the plaintiff as commissioner of highways of the town of Baldwin, in the county of Chemung, to recover a penalty of five dollars, for obstructing a highway, under 1 R. S. 521, section 202.

The complaint alleged that the highway was duly laid out in the year 1852, and that after it was laid out, opened, worked, used and traveled, the deponent, on or about the years 1856 and 1857, built a fence across it and entirely obstructed it, and that he kept up and continued such obstruction.

The defendant denied each and every allegation of the complaint, and denied that any road was ever laid out or worked, and alleged that if any steps had been taken to lay out a road, they were irregular and void, and contrary to the statute.

He also alleged in his answer, that the road alleged by the plaintiff to have been laid out, opened and used, was afterwards altered by the commissioner of highways, so as to authorize the location of the defendant's fence as it was located.

The defendant did not give or offer any security, as required by section 56 of the Code, where title to real property comes in question in the action.

Issue was joined on the 30th of August, 1858, and the cause was tried before the justice and a jury, on the 24th of September, 1858.

On the trial, the plaintiff proved by one witness that there was a road running on the line between the defendant's farm and the adjoining farm, part of the way, and part of the way wholly on the defendant's farm, which was traveled by the public; and while it was so being used by the public, he was ordered by the defendant to haul logs into it, and did so, and the defendant built a fence across the road so as entirely to obstruct the travel, which obstruction still remained.

On his cross-examination, the witness testified that it had been traveled about a year before it was fenced up by the defendant, and was fenced up the next fall after it was cut

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open. It appeared that the road had been opened through the woods, and the defendant cleared up to it, and fenced across it.

The plaintiff offered no evidence that it had ever been laid out as a highway, and there was no evidence to show that it had been used by the public over one year, when it was obstructed by the defendant.

When the plaintiff rested, the defendant moved for a nonsuit, on the ground that the plaintiff had not shown the existence of any highway, either by user or any act of public authority.

The motion was denied, and the defendant excepted.

The defendant then offered in evidence the order of the commissioners of highways laying out the road in question, for the purpose of showing that by the courses and distances, and location, the obstruction complained of was not in any part of the highway. This was objected to by the plaintiff on the grounds:

1. That such proof raises and draws in question the title to land.
2. That the court could not try the question whether the road was or was not laid out by the commissioners, but only the question whether the road was used as a highway.
3. That the defendant had admitted the existence of the highway as alleged, by not pleading title.
4. That the evidence offered was immaterial.

The justice sustained the objections and excluded the evidence, and the defendant excepted.

The defendant then offered the making and filing of an order laying out said highway, for the purpose of showing that it was a laid out highway, and not one established by public use merely; and also for the purpose of showing that it was void, for the reason that no courses and distances were contained in it. This was objected to for the same reason as the other, and was excluded.

The jury found a verdict in favor of the plaintiff.

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On appeal by the defendant to the county court of Chemung county, the judgment in the justice's court was reversed.

The plaintiff thereupon appealed to the supreme court, where the judgment of the county court was affirmed, and he now brings his appeal to this court. The case here is submitted on printed briefs and points.

E. H. BENN, *for the appellant.*

J. HERRON, *for the respondent.*

JOHNSON, J. It is well settled that the question of a right of way, either public or private, is a question of title to real property, which a justice of the peace has no jurisdiction to try. (*Randall agt. Crandall*, 1 *Hill*, 342, and cases cited.) There is no question in respect to the jurisdiction of the justice to try and determine the action. If the defendant had wished to raise that question, he should, at the time of answering, have delivered to the justice the written undertaking prescribed by section 56 of the Code. Not having done so, he was precluded from drawing the title or right of way in question, in his defense. (*Code*, § 58.) Unless it was made to appear by the plaintiff's own showing, that the right and title of the public to the highway was in question, it was the duty of the justice to proceed with and render judgment. The plaintiff proved that there was a road along the line of the defendant's premises, and part of the way across them, which was opened and used by the public, and that the defendant built a fence entirely across it, so as to shut out completely all travel.

Upon the cross-examination of the plaintiff's witness by the defendant, it appeared that the road had only been opened and traveled about a year, when it was thus obstructed. Was this, under the circumstances, sufficient evidence to prove that the defendant had obstructed a highway? The public were then using it as a highway, and the defendant was precluded

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from raising the question of right to a highway on his premises, if the evidence was sufficient to establish the public right, *prima facie*. The defendant had not admitted either that it was a highway, or that he had obstructed it, by omitting to deliver the undertaking. But he was not at liberty to raise any question in regard to the public right, if the plaintiff gave any evidence tending to show that it was a highway. The plaintiff, undoubtedly, to entitle himself to recover, was obliged to give evidence not only of the obstruction, but that it was in a highway also. And this, it is claimed, he did, *prima facie*, when he showed that it was a road the public had used as a highway a year or more. But this did not prove that it was a highway by user, nor tend to prove it. The right by user is only made out by evidence of use and occupation twenty years or more. Nothing short of that will answer, and as the plaintiff gave no evidence of its being a laid out highway under the statute, there was nothing to show that any public right had been encroached upon, and the plaintiff should, I think, have been non-suited.

But conceding that the evidence was, *prima facie*, sufficient to establish some right in the public, the defendant most clearly was entitled to show in what manner it was acquired, and if it was by proceedings under the statute, to introduce the order laying out the highway in question, for the purpose of showing that the alleged obstruction was not within the bounds of the highway. That was the only purpose for which it was offered, by the first offer. I do not see why the evidence was not competent for that purpose. In that view, and for that purpose, the order did not draw the title of the public in question, but conceded it, and merely raised the question of boundary. In actions of this kind, there can be no doubt, I think, that the question whether the alleged obstruction is within the bounds of the highway, is always open to proof by the defendant. It is a question which does not properly involve title, but is entirely distinct and separate from it. It admits title, and seeks only to define and fix the

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boundaries. This was so held in *Fleet agt Youngs* (7 Wend. 291, 299). The court say, the question of encroachment may be determined without an investigation of the title; "the question was, where was the boundary of the road? not who owned the land." The road was shown to have been upon the defendant's land, and it would be strange, indeed, if he could be rightfully precluded from showing its limits and boundaries. The law is not so unreasonable as to presume that a public highway is without definite boundaries, or that it embraces an entire farm, and in a case where he cannot dispute the right to a highway, will allow the owner of the land, for his own protection, to show where the right is located, by way of defense. The plaintiff might clearly have introduced the order in evidence, and that would have shown where the highway was located through the defendant's land. But he preferred to resort to, and rest upon, other evidence of an inferior character. But this did not affect the rights of the defendant when he entered upon his defense. He was then entitled to show, if he could, where the highway to which the people had an undisputed right, was, and that he had not obstructed it, but had built the fence alleged to be an obstruction, on some other part of his land. This question the justice was clearly competent to try, being a question of boundary lines merely, and not one of title to land.

I am of the opinion, therefore, that the judgment of the supreme court was right, and should be affirmed.

Judgment affirmed.

Strittmacher agt. The Salina and Central Square Plankroad Co.

SUPREME COURT.

JOHN STRITTMACHER, appellant agt. THE SALINA AND CENTRAL SQUARE PLANKROAD COMPANY, respondent.

While the *report of a referee* will not, as a general rule, be disturbed, if there is evidence which may be said fairly to sustain it, even though there is apparently a strong array against it, it will not be upheld where the evidence on which it professes to be founded, not only comes far short of sustaining, but in some of its aspects is at war with its conclusions, and where that on the other side, is not only numerically, but intrinsically overwhelming.

The report of the referee in this case considered to be an extraordinary one to be made by a sensible man and a good lawyer.

Onondaga General Term, October, 1867.

Before BACON, FOSTER and MULLIN, Justices.

THIS action was brought by the plaintiff to recover damages for injuries received by his horse while traveling on the defendant's road.

The defendant answers by general denial.

It being admitted that the defendant was a corporation, organized, &c., as set forth in the plaintiff's complaint, the only questions remaining to be litigated, were :

1st. The defendant's negligence; and,

2d. The amount of damages sustained by the plaintiff on account of such negligence.

The cause was tried February 1, 1867, before Hamilton Burdick, Esq., referee, who reported for the plaintiff \$45.50 damages. The defendant's costs were taxed at \$73.24. The damages were off-set *pro tanto* against the costs, and judgment for the balance, 27.74, entered in favor of the defendant.

From that judgment this appeal is taken.

The referee found the following *conclusions of fact* :

1st. That the defendant is a corporation, organized as a plankroad company, and take toll from persons traveling thereon.

2d. That about the 20th of September last, the plaintiff was returning from market with his horse and coal wagon,

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and at a point between the old Salina bank and water tank, and traveling upon defendant's said plankroad, the plaintiff's horse caught one of his feet in a hole in or between the plank, and fell, and was injured by the partial severing of the cord on the nigh fore leg, above the fetlock, and from the injury was laid up, so that the plaintiff was deprived of the use of the horse for thirty-three to thirty-four days.

3d. The plaintiff employed a horse doctor, whose services were worth, and the plaintiff paid therefor, the sum of \$6.

4th. I find that the keeping of the horse was worth fifty cents per day, and the use of the horse seventy-five cents per day, at the time of the injury; which several sums, I find, are the damages sustained by the plaintiff, resulting from the injury, and which in the whole amount to the following:

34 days keeping, at four shillings.....	\$17.00
30 days, working days, at six shillings.....	22.50
Paid doctor.....	6.00
	<hr/>
	\$45.50

To which the plaintiff excepted.

5th. I find that the horse has sustained no permanent injury, but only temporary.

To which the plaintiff excepted.

I find that the defendant's road was out of repair, and along the vicinity, and at the place of the injury, was defective, worn, and dilapidated, and holes in or between the plank, by wearing and splitting off the edges of the plank, where other horses had stepped in, and the gate-keeper for defendant's attention called to it, although the road is conceded to be better than the average of plank roads, at this Salina end of the road it had been suffered to be in bad condition.

The said referee found as *conclusions of law*:

1st. That the injury was the result of the bad condition of the road at the place of the injury, and that the defendant is chargeable with negligence for that condition, and liable for the injury complained of.

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2d. That it was without fault on the part of the plaintiff.

3d. I further find that the plaintiff is entitled to recover his said damages, and to judgment for the sum of \$45.50 damages.

To so much of which as limited the amount of recovery to \$45.50 only, the plaintiff excepted.

I. The plaintiff requested the referee to find that the injury to plaintiff's horse, as shown by the evidence, was an injury of a permanent character, tending permanently to diminish the value of said horse, and that the defendant is liable to the plaintiff for such diminution in value.

Which the said referee refused to find, and the plaintiff excepted to such refusal.

II. The plaintiff further requested the referee to find, that a bunch or scar upon the leg of plaintiff's horse, caused by an injury sustained through defendant's negligence, is a blemish which would hurt the sale of said horse at least \$20, and that the defendant is liable to the plaintiff for such decrease of value.

Which the said referee refused to find, on the ground that he has already found upon that question, and the plaintiff excepted to such refusal.

III. The plaintiff also requested the referee to find, that the stipulation made by the counsel on the trial of this action, fixing the damage to the plaintiff for the loss of the use of his said horse at \$1.50 per day, for thirty-four days; which stipulation was entered upon the minutes of the referee at the time, is binding upon the parties; and that the defendant is liable to the plaintiff for this item of damage thus admitted to have been suffered by him, to wit: the sum of \$51.

Which the referee refused to find, and the plaintiff excepted to such refusal.

T. K. FULLER, attorney and counsel for plaintiff and appellant.

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I. The finding of the referee that "the horse has sustained no permanent injury, but only temporary," is *against the evidence in the case*; to which finding the plaintiff duly excepted.

The proof shows that the value of the horse was materially diminished by the injury, and by the blemish and lameness consequent upon it; and said diminution of value was variously stated by plaintiff's witnesses at \$50 and upwards. It was also stated by defendant's witness, Henry Collins, the only one who testified as to the amount of damage caused by the wound, at \$20 at least. On this point there is no conflict of evidence. The only evidence which seemingly tends to the contrary, is found at folio 99, and reads thus: "If the horse is lame, it decreases the value of the horse considerably; if not lame, should not think it would injure."

The proof shows the horse was lame at the time of the trial, four months and over after the injury; and never before while the plaintiff owned her, except once when pricked by a blacksmith in shoeing.

The only testimony which apparently contradicts the above, is found at folios 103 and 108. At folio 103 the witness says: "I did not notice that she went lame;" and at folio 108 witness Ferguson says: "She was not lame; I think the limping caused by windgalls or stiffness."

But the referee awards no damages for this decrease of value, and his refusal to find as requested on this branch of the case was an error.

II. On his cross-examination, the plaintiff testified: "I had owned this horse two years."

Question. What did you pay for the horse?

Objected to by the plaintiff as immaterial.

Objection overruled, and the plaintiff duly excepted.

What the horse cost plaintiff two years prior to the injury, in no way determines the value of the horse at the time of the injury.

III. At folio 120, Stephen Lillie, superintendent of defend-

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Question. If the foot was caught between the plank as described, would it be possible for this wound to have been made?

Objected to by the plaintiff as improper and immaterial. Objection overruled, and the plaintiff excepted.

The question calls for the opinion of a witness not an expert, on a possibility, for the purpose of disproving an established fact.

IV. At folio 59, the plaintiff on his cross-examination, testifies: "I can't tell what the use of one horse is worth for other folks."

At this point the following stipulation was made by the counsel of the respective parties, and entered at the time on the minutes of the referee:

"It is agreed upon that the damages per day was \$1.50 per day, for thirty-four days, for the use."

Afterwards, the counsel for the defendant asked the following question: "What was the ordinary price per day for the use of a horse?"

Objected to by the plaintiff, on the ground that that had been settled by stipulation of counsel.

Objection overruled, on the ground stated at folios 79 and 80 of the case—which see. The plaintiff then and there duly excepted.

The same question, objection, ruling and exception, occurred at folios 96, 101, 104 and 125.

This ruling of the referee is erroneous, because (*see Code, 1867, additional notes, p. 1047,*) "an oral stipulation by counsel, on the trial of a cause in the presence of the court, relative to the action, and entered in the minutes, is binding on the parties." (41 *Barb.* 648; *Code Rule, 13 j.* citing 7 *Paige, 587.*)

Availing ourselves of the defendant's own understanding of the stipulation, as incorporated by the referee into the act, testifies: "I saw the cut on plaintiff's mare, and examined it."

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case, the plaintiff is entitled to damage for at least *four* days, at \$1.50 per day, which would amount to \$6; and that added to the judgment already rendered, to wit: \$45.50, would make the amount over \$50, and carry costs; but the referee, after finding that the plaintiff was deprived of the use of his horse for thirty-three to thirty-four days, allows damage for thirty days only, at six shillings per day.

The judgment should be reversed, and a new trial granted.

NOXON & NORTHRUP, attorneys and counsel for defendant, respondent.

By the court, BACON, J. This is certainly an extraordinary report to be made by a sensible man and a good lawyer. The action is to recover for an injury suffered by the horse of the plaintiff, under circumstances where no possible fault could be imputed to him, and where the conduct of the defendant was most culpably negligent. On this point the referee finds as a question of fact, distinctly and emphatically, that defendant's road was out of repair, and at the place of the injury was defective and dilapidated, with holes in and between the plank where other horses had stepped in, and the attention of the defendant's gate keeper was called to it. As conclusions of law, he finds that the injury was the result of the bad condition of defendant's road, and that defendant is chargeable with negligence for that condition, and liable for the injury complained of, and that it was without fault on the part of the plaintiff; and these conclusions are abundantly sustained by the evidence. It was a case that called for the exercise of no special liberality towards the defendant, and where the plaintiff was entitled to full compensation for the injury he had thus causelessly suffered. And yet, when the referee comes to the task of computing these damages, he appears not only to reject in mass the whole of the plaintiff's testimony, given by eight witnesses besides the plaintiff himself, but to have found some things in opposition even to the

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defendant's witnesses ; and by a studious effort at the closest ciphering, to bring down the damages to a point where the plaintiff, an admitted sufferer, without the slightest imputation of blame on his part, goes out of court with the privilege of paying some \$28 for a lame and injured horse, and the defendant, an acknowledged wrong-doer, is rewarded with a substantial triumph in the legal arena.

I dissent entirely from the conclusions of the referee, both in respect to the temporary character of the injury, and the amount of damages as they existed in fact, and as found by him, even upon his own theory. On the first point, his finding is not only unsustained by evidence, but it is directly in the face of the most overwhelming testimony to the contrary. Every one of the nine witnesses sworn on the part of the plaintiff, concur in stating that the injury was of a permanent character ; that it both injured and disfigured the foot, rendering the animal much less valuable for service, and depreciated her value in the market. A fair average of the testimony would make that depreciation considerably over \$100, and the very lowest estimate of the difference in her value, before and after the injury, is put by one witness at the sum of \$100. Such an array of evidence should be met by something of corresponding strength by the other party, to justify a finding which sets it all aside. But how is the fact ? Only four witnesses on the part of the defendant profess to speak of the value of the mare at any time, and of these, Springer says, she was worth \$100 last year, and that he does not know her present value. Hinsdell says, she was worth \$125 before the injury, and of her present value he does not speak at all, but adds : " if the horse is lame, it decreases the value considerably ; if not lame, should not think it would injure." Leach gives her value before the injury at \$100, and says not a word of her present value ; while Collins swears expressly, that in September, previous to the trial, she was worth from \$100 to \$125, but that " the wound takes off at least \$20 from the value of the mare." To show her condition about

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the time of the trial, three or four witnesses on the part of the defendant, spoke of her either as she appeared while merely passing, or on a cursory examination of the injured leg, or as exhibiting no lameness while on a walk, while on the part of the plaintiff, witnesses speak who had driven her, rode after her, and treated her for the injury, and they concur substantially in the character and continuance of the injury, down to the time of the trial, and its permanent effect upon her value. While the report of a referee will not, as a general rule, be disturbed, if there is evidence which may be said fairly to sustain it, even though there is, apparently, a strong array against it, it will not be upheld where the evidence on which it professes to be founded, not only comes far short of sustaining, but in some of its aspects is at war with its conclusions; and where that, on the other side is not only numerically, but intrinsically overwhelming; and such is the aspect which, upon this point, this case presents to my mind.

Upon the question of the actual damages, assuming the injury to have been only temporary, there seems to be the same studious effort to place the damages at the lowest possible figure that the testimony of any witness would authorize, and the same wholesale ignoring of the testimony on the part of the plaintiff. On the subject of the value of keeping the animal, six witnesses were sworn on the part of the plaintiff, three of whom placed it at seventy-five cents per day, and three at from seventy-five cents to one dollar. On behalf of defendant, only two were sworn on this point, one of whom put the keeping, including care and nursing, at seventy-five cents, and the other at from thirty to forty cents per day. This last witness, by the way, indicated his reliability, and perhaps commended his judgment to the referee, by stating that at the time this mare was kept, he did not know the price of oats, nor how many pounds of hay a horse would eat in a day, and that he made his estimate upon the ground that it would ruin a man to keep three or four horses, if it cost more than the sum he named. If the witnesses were all equally,

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reliable a fair average of their testimony would place the worth of keeping a horse at from seventy-five to eighty cents per day, and yet in utter disregard of the plaintiff's testimony, and straining that of defendant to the lowest possible point, the referee puts the expense at fifty cents per day.

On the subject of the value of the use of the mare per day, the same criticisms will substantially apply, and the compensation is brought down to the minimum which the defendant's testimony will permit, and no regard is apparently paid to that on the part of the plaintiff, and what is a little remarkable, while the plaintiff is allowed for thirty-four days keeping, he is only allowed for thirty days use. This is arrived at probably, by the ingenious device of omitting the Sabbath days. But if such a nice scruple was to be indulged, I am somewhat at a loss to divine why the care and keeping for those days was not also deducted, since if the horse was not conscientious enough to refrain from eating, and from exacting the care and attention which his condition would seem to require, his owner surely must be expected to omit on those days, those works of necessity and mercy, which even a poor brute might reasonably demand at his hands.

In an early stage of the trial, it seems to have been agreed upon by the counsel for both parties, that the value of the use of the horse was \$1.50 per day, for thirty-four days; but on the suggestion afterwards, that there was a misunderstanding, and that the admission only related to the use of a horse for the four days that the plaintiff had been obliged to hire one of Gaesbecker, the stipulation was vacated, and the question opened for further testimony. I don't think the referee is chargeable with any error in relieving the party under the circumstances, from the effect of his admission; but two things seem to have been overlooked by the referee. The stipulation as it stands, with the correction insisted upon and allowed by the referee, admitted thirty-four days as the time for which the plaintiff was to be allowed, and that the use of Gesbecker's horse was worth \$1.50 per day for four days.

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In the face of this stipulation, thus binding upon the party, by his own admission, the referee has struck out the four days, and instead of the \$1.50 for four days, has only allowed seventy-five cents per day for the whole thirty days.

This alone would have given the plaintiff a report for more than \$50, and there is no possible escape from this, even if we adopt the entire theory of the referee, in his estimate of the amount of damages. But upon what ground it was assumed that Gaesbecker's horse was worth \$1.50 per day, while the plaintiff's was worth only seventy-five cents for the same period, especially as there was no proof that he performed anything more than the usual service the plaintiff required of his own horse, passes my comprehension.

I am inclined to think there were some errors committed upon the trial by the referee, in relation to the reception of evidence. But I do not think it worth while to notice them, since upon the grounds already discussed, if right in my views, there must, of necessity, be a new trial.

I am of the opinion that the judgment should be reversed, and a new trial granted, with costs to abide the event, and the order of reference vacated.



COURT OF APPEALS.

JANE STEBBINS and another agt. MATTHIAS HOWELL.

Where a person under an agreement to purchase two lots of land, subject to the payment of a certain mortgage thereon, and to build a building on each lot, at a certain time and under certain conditions, upon the performance of which he is to receive a deed in fee of the premises; and after the buildings are partially built, he, by fraud and misrepresentation induces the mortgagee to release one of the lots, without any consideration therefor; a court of equity will restore the mortgagee, as far as possible, to his former condition as to the security, by decreeing that the purchaser pay in money to the mortgagee one-half the amount of the mortgage; although the purchaser alleges that the remaining lot and building are ample security for the whole mortgage money.

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June, 1864.

THE plaintiffs held a mortgage given in February, 1856, for \$5,500, on two building lots in the city of New York. In March, 1857, certain parties who had become owners in fee of the mortgaged premises, contracted to sell the lots to the defendant, Howell, he agreeing to erect a dwelling house on each lot, of a description given in such agreement, and to complete the same by the first day of March, 1858. Howell was entitled to a deed of the premises when the houses were inclosed, on paying the purchase money, less the plaintiffs' mortgage; and the deed was to contain a clause binding and subjecting Howell to the payment of the incumbrance. Howell commenced immediately to build the houses under the agreement. In August, 1857, while the houses were in process of construction, and had become inclosed, Howell, by representing to the plaintiffs that he was the owner of these lots, and that he desired to have them release the mortgage lien on one of these lots, and loan him the further sum of \$1,000 on the remaining lot, he procured them to release the said mortgage lien on one of the lots, and after obtaining said release, and procuring the same to be recorded, he refused to take the loan and give the security promised. The representations of the said Howell, in respect to his ownership of the said lots was false, and he acted in bad faith in procuring the release of the mortgage lien upon said lot.

The plaintiffs, on discovering the fraud of Howell, commenced their action against him, setting forth in their complaint the above facts, and also that the said Howell was not the owner in fee of either of said lots, but only the holder of an agreement for the purchase and sale of the same. That the fee in the remaining lot was in one Browning, subject to the agreement for purchase, held by Howell. The said Browning was made a party defendant. That the interest of Browning in said lot was about \$1,600. That plaintiffs had applied to Browning for his consent in writing to have the whole amount due on the mortgage charged upon said lot, the

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fee of which was in him. But he refused to consent to the same.

The plaintiffs, among other things, pray for an injunction against Howell and Browning, and each of them, restraining them from conveying, or in any manner incumbering the said lots of ground, or any portion thereof. The plaintiffs also prayed that Howell should be directed to restore the said mortgage lien upon said lot, or that he should be decreed to pay to the plaintiffs the sum of \$2,750, and interest, as the consideration of the release of the mortgage lien thus fraudulently obtained by him. The prayer for injunction was granted.

At the special term of the supreme court in the first district, held in June, 1858, the judge found the above facts as to the rights of the plaintiffs, and the fraudulent conduct of the defendant Howell, and found as a conclusion of law, that the plaintiffs were entitled to payment by the defendant Howell, of the sum of \$2,750, being one-half the amount due upon said mortgage, with interest from the 26th September, 1857, and judgment was rendered for the same, and for costs, against the defendant Howell. Howell appealed to the general term, where the judgment of the special term was affirmed, and he now appeals to this court.

JOHN P. CROSBY, *for the respondent.*

SOLOMON L. HULL, *for the appellant.*

WRIGHT, J. The case is this: The plaintiffs held a mortgage given in February, 1856, for \$5,500, on two building lots in the city of New York. In March, 1857, certain parties who had become the owners in fee of the mortgaged premises, contracted to sell the lots to the defendant Howell, he agreeing to erect a dwelling house on each lot, of a definite description, and complete the same by the first of March, 1858. Howell was to be entitled to a deed of the premises when the houses were inclosed, on paying the purchase

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money, less the plaintiffs' mortgage; and the deed was to contain a clause subjecting and binding him to the payment of the incumbrance. Howell commenced forthwith to build the houses, under the agreement.

In August, 1857, while the houses were being built, and were inclosed, by a fraud of Howell, or bad faith on his part, the plaintiffs lost the lien of their mortgage on one of the lots, and the other may or may not be ample security for the sum of \$5,500. It certainly is not without the building on it. But whether it is or not, is of no consequence whatever. Howell paid nothing for the release of the lien of the plaintiffs' mortgage, and never had any right to it, except upon his performing in good faith the contract, in pursuance of which the delivery of the release was anticipated.

In August, 1857, representing himself to the plaintiffs to be the owner of both lots, when in fact he had the title to neither, he applied to them to release the mortgage lien on one of the lots, and lend him an additional sum on the remaining lot. It was agreed to release the lien on one lot, and loan him the further sum of \$1,000, which was afterwards extended to \$1,500 on the other lot. Of course, the release and the additional loan were intended to be simultaneous transactions, and the agreement for both was manifestly based on the supposition that Howell was the owner of the whole mortgaged premises. Otherwise, the release of one-half of the premises from the operation of the mortgage, was without any consideration whatever, and the plaintiffs were placed in jeopardy of a loss of one-half their mortgaged debt.

The agreement was not immediately consummated, and in the meanwhile, under the pretense that he would carry it out, and the plaintiffs relying on his good faith, Howell obtained the release, and afterwards persistently declined to perform on his part, although there was no difficulty in his doing so. It turned out that he had but an equitable interest in the lot not released, but was entitled to a deed of the same on the payment of \$1,500—the exact amount which the new loan

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would have extinguished had the agreement been carried out, and the party holding the fee was ready and willing to execute such conveyance to him on receiving that sum. After procuring the release, however, and having it recorded, he refused to proceed any further in consummating the agreement, and giving as the reason for non-performance on his part, that the money was not forthcoming from the plaintiffs when he wanted it; that the time had gone by for selling the houses on the lots, and he would have to pay the interest and taxes on the lot not released from the lien of the mortgage, which, as between him and the person holding the title, the latter ought to pay.

It seems to me to require but a simple statement of the case, to show the correctness of the judgment of the court below. The defendant Howell, having obtained the release, if not under false pretenses and misrepresentations, or concealment of the truth, yet without any consideration, and without carrying out the arrangement into which he had expressly entered, should be compelled to restore the plaintiffs to their former condition as to the security. It is no answer whatever to him, that as that part of the mortgaged premises, with the building thereon, is worth double the sum secured by the plaintiffs' mortgage, no damage could result to them by his surreptitiously obtaining a release of one-half the mortgaged premises. The value of their security is lessened one-half, and to that extent by the defendant's fraud or bad faith, they are put in jeopardy of loss. As the release could not be recalled, and that part of the mortgaged premises released was of equal value with what remains, subject to the lien, the only equitable mode of restoring the plaintiffs to their original condition as to their security, was that adopted.

The judgment should be affirmed.

Concurring—MULLIN, JOHNSON, DAVIES and INGRAHAM.

HOGEBOOM read for modification.

DENIO did not vote.

Affirmed.

Blydenburgh agt. Thayer.

COURT OF APPEALS.

**WILLIAM J. BLYDENBURGH, Executor, &c., appellant agt.
HORACE THAYER, respondent.**

The doctrine is well settled, that the assignee of a chose in action, not negotiable, takes the thing assigned subject to all the rights which the debtor had acquired in respect thereto, prior to the assignment.

Where A. loaned B. his promissory note for the exclusive benefit of B., the payee, who was at the time largely indebted to A.; and B. before the maturity of the note transferred it to C., as collateral security for the sum of \$50, borrowed money (the note being \$950), C. after the maturity of the note, commenced an action against A., and obtained judgment upon the note. D. sold to B. property for which he took in payment an assignment of this judgment from C., and paid C. his \$50 and interest; neither C. nor D. having any notice of the defense or set-off to the judgment by A.:

Held, that nothing having been done by A. which estopped him from setting up his equities as against either B. C. or D., the judgment was only available in the hands of either of them to the extent of the \$50 advanced by C., and the interest thereon, and the costs of the action. On the payment of these sums A. was entitled to have the judgment cancelled.

January Term, 1867.

THIS action is brought to obtain a cancellation of a certain judgment against the plaintiff's testator, now held and owned by the defendant.

G. MILLER, *for appellant.*

WATSON & STONE, *for respondent.*

DAVIES, Ch. J. A correct understanding of the facts found by the referee, will be more readily attained by reference to those stated in the pleadings, and not controverted. The plaintiff's testator made his certain note for the sum of \$950, payable to the order of one Robert Stewart, and delivered the same to him. Stewart borrowed of one Amasa S. Foster, the sum of \$50, and transferred to him the said note as collateral security, before its maturity.

Foster commenced a suit upon the note when over due, and recovered judgment therein against plaintiff's testator. Defendant sold to Stewart, the payee of the note, certain

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property, for which he took in payment an assignment of said judgment from said Foster, and which was procured from him by said Stewart, as repayment to said Foster of the sum of \$50 advanced by him to said Stewart, and the interest thereon, and the costs of said judgment.

The referee before whom the action was tried found as facts :

1. That the note upon which Foster recovered judgment against Blydenburgh, was before it was due, indorsed over by Stewart, the payee, as security for \$50 borrowed money.
2. That the note was lent by Blydenburgh to Stewart, for his accommodation.
3. That Stewart, at the time the note was given, was largely indebted to Blydenburgh for money lent and money paid to his use, and such indebtedness still remains.
4. That the defendant paid Foster his \$50, with interest and costs, when the judgment was assigned to him.
5. That such payment was made as part of the purchase money agreed to be paid to Stewart by the defendant for the judgment, and the judgment was assigned to the defendant by Foster, at Stewart's request, and without any notice or knowledge on the part of either Foster or the defendant that Blydenburgh had any defense or set-off against the judgment, or the demand on which it was recovered, and that the defendant paid full value for the judgment. The referee thereupon gave judgment for the defendant that the plaintiff's complaint be dismissed with costs, and which judgment on appeal was affirmed at the general term.

Upon the facts found by the referee, it is immaterial to inquire whether the plaintiff's testator had a good defense to the action upon the note, instituted by Foster. The interest of Foster in the note and judgment, was only to the extent of the \$50 advanced by him to Stewart, and the costs of the action; on payment of these sums to him by Stewart, he was entitled to a transfer of the judgment. Stewart was, therefore, the equitable owner of the judgment, subject to

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the lien of Foster thereon, and his interest therein to the extent of these amounts.

The referee found as a fact that the note was indorsed by Stewart to Foster, "as security for \$50 borrowed money."

It then becomes necessary to inquire what were the equities between Stewart and the plaintiff's testator. They are settled by the finding of the referee. He finds that the note was lent by Blydenburgh to Stewart, for his accommodation, and that Stewart, at the time the note was given, was largely indebted to Blydenburgh for money lent and money paid to his use, and that such indebtedness still remains.

It is too clear to need argument or illustration, or authority, that Stewart could not enforce this judgment against the estate of the plaintiff's testator. The next inquiry is, does the defendant, who is the assignee of Stewart of the whole judgment, except as to the amount paid to Foster, stand in any better position than Stewart? This question has been repeatedly answered by adjudications in this court. (*Callanan* agt. *Edwards*, 32 N. Y. 483; *Bush* agt. *Lathrop*, 22 N. Y. 535; *Anderson* agt. *Nicholas*, 28 N. Y. 600; *Beebe* agt. *Bank of New York*, 1 Johns. 529.)

These cases all affirm the doctrine that the assignee of a chose in action not negotiable, takes the thing assigned subject to all the rights which the debtor had acquired in respect thereto prior to the assignment.

The assignee takes subject to all existing equities, and these on the part of the plaintiff's testator were, that the judgment could not be enforced against him to the amount due to Foster, and which was paid to him.

Nothing was done by the plaintiff or his testator, which estops him from setting up these equities as against either Foster, Stewart or the defendant. The judgment was only available in the hands of either of them to the extent of the \$50 advanced by Foster, and the interest thereon, and the costs of the action. On payment of these sums, the plaintiff or his testator was entitled to have the judgment cancelled.

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The judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

Reversed.

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COURT OF APPEALS.

WILLIAM B. RENWICK, *et al.*, Administrators, &c., of ROBERT RENWICK, deceased, respondents agt. THE NEW YORK CENTRAL RAILROAD COMPANY, appellants.

In an action for negligence against a railroad company, where there is considerable evidence given on both sides as to whether or not the defendant's bell was rung before coming to the crossing where the collision occurred, it is not a case for a nonsuit, but the question should be submitted to the jury.

Although if the plaintiff had stopped his carriage at a point nearer the track, he might have seen the train, and avoided the danger, his not doing so is not necessarily negligence. (*Ernst agt. Hudson River R. R. Co.* 32 How. 61.)

January Term, 1867.

PARKER, J. Upon the question of the defendant's negligence in this case, it is impossible to maintain that there was no conflicting evidence. If no signal was given from the train of its approach to the crossing where the injury occurred, either by the ringing of the bell or the sounding of the whistle, the defendants are chargeable with negligence.

Now upon the question whether the bell was rung or not, it is undeniably true that considerable evidence was given on both sides. On the part of the plaintiff, both he and his daughter swore that they listened for the train as they approached the crossing, and did not hear it. Several witnesses upon the train testified that they heard no bell or whistle before the whistle for the brakes at the crossing.

Mrs. Thomas, whose house the train passed about fourteen rods before it reached the crossing, swore that there was no signal either from the bell or whistle; and Mrs. Adams, who

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was observing the train from the same house, heard none. Sacket, who was at his house three-quarters of a mile east of the crossing, and one hundred rods from the track, heard the train, but heard no bell or whistle, until the whistle for the brakes. Now, though most of this is negative evidence, and the defendant has on its side the positive testimony of four witnesses that the bell was rung, still as some of the plaintiff's witnesses were in a condition to hear it if it had been rung, and were giving their attention to the train, the fact that they did not hear it, is evidence conduced to prove that it was not rung. Two of the defendant's witnesses who swear that it was rung, are the engineer and fireman, who were in fault if it was not rung; the character of another was impeached. The conflict raises a question of fact, which the plaintiff had the right to have determined by the jury.

There can be no pretence that the plaintiff was so clearly guilty of negligence himself as to require the court to non-suit. His own testimony, and that of his daughter, show the exercise of all the prudence which the circumstances required. He stopped, and looked and listened, from four to six rods from the track, and hearing no signal nor indication that the train was approaching, started his horses, and kept looking to the right and left for the cars, until he reached the track, and then turning his eye to the right, found them upon him.

The train was behind time, and, as we must conclude for the purposes of this question, giving no signal of its approach. Although, if the plaintiff had stopped at a point nearer the track, he might have seen the train, his not doing so is not necessarily negligence. The thorough discussion of this question of negligence by this court, in the case of *Ernst agt. Hudson River R. R. Co.* (32 *How.* 61), renders unnecessary any further discussion of it here. Without an utter disregard of the doctrines of that case, it is impossible to hold that the plaintiff in this case should have been non-suited. Upon the question of the defendant's negligence to show that

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there was an omission of the requisite signal, Levi Yorks was called as a witness. He testified that he was a passenger on the train ; that he heard the whistle to "down brakes," but did not hear any long whistle, nor any bell. He was then asked by the plaintiff's counsel : " Could you have heard the sound of the whistle or bell, if one had been blown or rung ? This was objected to by plaintiff's counsel as incompetent, but was allowed, and defendant excepted. The witness answered : " I rather think I could have heard it."

Although it seems to me that this evidence was erroneously admitted, as involving the opinion of the witness upon a question which belonged to the jury to decide, my associates think the question should be construed as merely asking whether the witness was so situated that he could have heard, and in that view admissible.

The exception to the refusal to charge as requested, "that if the plaintiff could not see an approaching train from the east until near the crossing, and not in time to avoid the danger when he was within four to six rods from the track, it was his duty to stop nearer the track, if by so doing he might have seen the approach of the train in time to have avoided the danger ; and his omission to do this was negligence," was not well taken. (*Ernst agt. Hudson River R. R. Co. supra, and cases there cited.*)

The judgment should be affirmed.

All concur.

Affirmed.

Brown's Water Furnace Company agt. French.

necessary to warm his house; and this agreement must be construed to extend over the period which should accrue between the commencement of the work, and the time when the apparatus being completed, the sum of \$300 withheld, should become due—a subsisting right to make the necessary alterations to accomplish the degree of temperature necessary to satisfy the conditions of the contract. The plaintiffs, for aught that appears in the proofs, could have done at the outset what they contemplated doing after the furnace was found to be insufficient.

Upon a deliberate and thorough consideration of this case, therefore, it is evident that the charge of the presiding judge at the trial was not erroneous. The defendant had no right to impose the conditions stated, upon the plaintiffs' right to re-enter for the purpose of perfecting the furnace.

The other questions arising upon the appeal having been disposed of on the argument, the judgment must be affirmed.

NOTE.—The Note to the case of *White agt. Calder*, 33 *How. Pr. Reports*, 392, was made to the wrong case—it erroneously appearing in that case that it was an appeal from the N. Y. Superior Court; when the fact, as we understand it is, that case was in the Supreme Court, and tried at the Delaware circuit, before Judge BALCOM.

The Note made in 33 *Howard*, was intended to apply to a cause in the N. Y. Superior Court (the title of which is not recollected), tried before Judge BARBOUR, and is correct, with the exception that it was a *sealed verdict*, and the fine imposed upon the jurors was \$250 each, instead of \$500.—R.E.P.

Beardsley Scythe Company agt. Foster.

COURT OF APPEALS.

BEARDSLEY SCYTHE COMPANY agt. JOHN C. FOSTER.

In an action to reach the property of a judgment debtor to satisfy a judgment, it was held, that it was a fatal defect to the complaint, that it did not aver that the execution issued upon the judgment had been returned unsatisfied, in whole or in part. Also held, that the plaintiff had no right to claim an enforcement of the contract between Osborn and the defendant.

Also held, that it was erroneous and improper, to include in the judgment of affirmance on appeal, the judgment rendered at special term. That the only judgment rendered on affirmance and with costs, was for the costs of the appeal; and that when, as in this case, judgment had been entered up, not only for the costs awarded on affirmance, but for the amount of the judgment of the special term, it was the duty of the supreme court to amend the judgment by striking therefrom the judgment of the special term, and that the same should stand only for the costs awarded on affirmance.

September Term, 1867.

THE action was commenced to reach the property of one Osborn, the judgment debtor of the plaintiff. The complaint averred the recovery of the judgment for \$2,209.93, against Osborn, on a demand originally incurred by the firm of George Clow & Co., which firm consisted of said Clow and Osborn. That execution on such judgment was issued and remained unsatisfied, except for the sum of \$175.64, and that the balance of the judgment remained unpaid. That both Osborn and Clow were insolvent.

It was also averred that the defendant became possessed of the chattels, property and choses in action of Osborn, which originally belonged to the firm of George Clow & Co., under a bill of sale from Osborn, coupled with an agreement, having for its object the hindering and delaying of the creditors of the firm, to the effect that the same should be converted into money, and applied by Osborn to the payment of the liabilities of the firm of George Clow & Co., and whatever excess should remain, was to form and constitute a partnership fund between Osborn and the defendant, in a new business in which they proposed to engage.

Beardsley Scythe Company agt. Foster.

It was also averred that the defendant so became possessed of such property under this agreement, and in violation thereof, retained the possession of the same, and retained it to his own use.

The prayer of the complaint was, that the defendant might be compelled to account for the property and its avails, which came to his hands under the agreement, to the end that the same might be applied in satisfaction of the plaintiff's claim.

On affirmance of the judgment with costs, by the general term, of the judgment rendered at special term, a judgment was entered not only for the costs of affirmance on appeal, but it embraced also the judgment of the special term.

KING & CRANE, *for appellant.*

A. J. PARKER, *for respondent.*

BOCKES, J. Appeal from the judgment of the general term of the supreme court, affirming a judgment directed by a referee.

The action was put at issue, and referred to a referee to hear and determine. When the case was brought on for trial, the objection was raised that the complaint did not state facts sufficient to constitute a cause of action. The referee sustained the objection and dismissed the complaint. On appeal, the general term affirmed the judgment. Thereupon the plaintiff appealed to this court.

The complaint is most singularly and inartificially drawn. It is difficult to surmise, and impossible clearly to perceive, what theory of action the pleader entertained and endeavored to present by the pleading. It is entirely defective as a *creditor's bill*, to reach property fraudulently transferred, and equally so if the action was intended to enforce performance of the agreement set out, and which was evidently supposed to confer upon the plaintiff a right of action.

The complaint states that the plaintiff recovered a judgment in the supreme court against one Wm. Osborn, for

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\$2,209.93, on a demand originally incurred by the firm of "George Clow & Co.," which firm consisted of George Clow and said Osborn. That execution on such judgment was issued and remained unsatisfied, except for the sum of \$175.64, and that the balance remained unpaid. That both Osborn and Clow were insolvent.

It is also averred that the defendant became possessed of the chattels, property and choses in action of Osborn, which originally belonged to the firm of "George Clow & Co.," under a bill of sale from Osborn, coupled with an agreement having for its object the hindering and delaying of the creditors of the firm, to the effect that the same should be converted into money, and applied by Osborn to the payment of the liabilities of the firm of "George Clow & Co.," and whatever excess should remain, was to form and constitute a partnership fund between Osborn and the defendant, in a new business in which they proposed to engage.

The further averment is, that the defendant having so become possessed of such property under this agreement, in violation thereof, retained the possession of the same, and converted it to his own use.

The prayer is, that the defendant may be compelled to account for the property and its avails, which came to his hands under the agreement, to the end that the same might be applied in satisfaction of the plaintiff's claim. General relief is also demanded.

The complaint is radically defective as a creditor's bill to set aside the sale and transfer from Osborn to the defendant. It does not appear that the plaintiff has exhausted its remedy at law against Osborn, the judgment debtor, inasmuch as it is not averred that an execution was returned unsatisfied in whole or in part; this is essential to jurisdiction in this class of actions. (*Crippin agt. Hudson*, 13 N. Y. 161; *Forbes agt. Waller*, 25 N. Y. 430-434; *Dimby agt. Tallmadge*, 32 N. Y. 457; see remarks of Judge WRIGHT in the cases cited, and the authorities there given.)

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It is averred that an execution issued, and that \$175.64, were made thereon, and that the balance of the judgment remains unpaid. But it is not averred that the execution had been returned. This omission was a fatal defect to the statement of a cause of action in the nature of a creditor's bill. Nor was this defect cured by the allegation that both Osborn and Clow were insolvent. It was said in *McElwain agt. Willis* (9 Wend. 548), that the actual return of an execution unsatisfied, was essential to the maintenance of such a bill, both before and under the Revised Statutes, and that the place of such averment could not be supplied by an allegation of a total want of property. This remark received approval in this court in *Crippin agt. Hudson* (13 N. Y. 161-165), where it was said that the same rule obtains since the adoption of the Code.

An action in equity may be maintained in aid of an execution, without its return, when there has been an actual levy, with a view to remove fraudulent claims upon the property levied on. But such is not this case. No such relief is demanded, nor are there facts alleged on which it could be claimed. Neither is it directly averred that the arrangement between Osborn and the defendant, and the transfer of the property to the latter, were made with intent to hinder, delay and defraud the creditors of Osborn, and, therefore, void. True, it is stated in one part of the complaint that the defendant *proposed* to Osborn that the payment of his liabilities might be postponed and delayed; and that his creditors and those of "George Clow & Co., " might be kept off and delayed in the enforcement of their demands, by the *plan* *therein* (and hereinbefore) set out, to which proposition and *plan*, Osborn agreed. And in another part, it is stated "that except for the purpose of putting off, or hindering and delaying the creditors of the said "George Clow & Co., " the aforesaid notes and property, were to remain the property and effects of said Osborn." But there is nowhere a direct averment that the sale and transfer by Osborn to the defend-

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ant, was with intent to hinder, delay and defraud creditors, and, therefore, void. Such an averment would be contrary to the general scope and tenor of the complaint. It is entirely plain, I think, that the pleader did not count on the invalidity of the contract between Osborn and the defendant, but rather on its validity and breach. The theory of the complaint (if indeed it has any), is to enforce the contract. And again, in an action to reach property fraudulently disposed of by Osborn, the latter was a necessary party, in the absence of all excuse for the omission. (*Lawrence agt. Bank of the Republic*, 35 N. Y. 320—4.) Perhaps this objection should be deemed to have been waived by the defendant, pursuant to section 148 of the Code, because not taken either by demur-rer or answer. But it is unnecessary to consider this point at all, as it is very clear, that for other reasons above given, the complaint is fatally defective as a creditor's bill, and to reach property fraudulently transferred by Osborn to the defendant.

The action, however, was brought very evidently to enforce the agreement made between Osborn and the defendant, set out in the pleading. In this view, can the action be maintained on the facts stated ? It is very obvious that it cannot be. The plaintiff shows no right to the contract, or to its enforcement. As the agreement is stated in the complaint, there was no promise, even, on the part of the defendant to pay the plain-tiff's claim. It was well said in the court below, that the plaintiff shows no right to enforce contracts between Osborn and the defendant. The scythe company was not, either in fact or in law, the assignee or owner of the contract, nor of any claim or right under it, and of course, had no right to demand its performance. The dismissal of the complaint was obviously correct.

It is suggested that the judgment entered on the decision of the general term is erroneous, for the reason that it includes the general costs of the action embraced in the judg-ment directed by the referee, as well as the costs of the

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appeal. As a matter of practice, this was clearly erroneous. It has long been the settled practice to enter judgment for the costs of the appeal only in the judgment of affirmance. Indeed, an order of affirmance gives a right of recovery only for the costs of appeal, and no new judgment for a recovery against the party should be entered except for those costs.

This was decided in *Eno* agt. *Crook* (6 *How. Pr. R.* 462). It was there correctly stated that there was an obvious impropriety in entering up two judgments in the same court for the same demands. "That on affirming a judgment at general term, the court does not direct a new judgment to be entered for the original claim. But it simply declares that it is satisfied to let the former judgment stand, and, therefore, simply affirms it. This is all that the entry of judgment should contain, unless costs are awarded, in which case it should adjudge the costs to the prevailing party."

Such was held to be the correct practice, by the superior court of the city of New York, in *De Agreda* agt. *Mantel* (1 *Abb.* 130), decided at general term of that court. In that case the judgment of affirmance included the former recovery. The court held, that this was error in practice, and directed the second judgment to be vacated except for the costs awarded to the appellant. This question of practice was again under consideration in the supreme court, in *Halsey* agt. *Flint* (15 *Abb.* 367). The judgment included the interest upon the judgment which was affirmed. The court at general term held, that such interest did not properly come into the judgment of affirmance. It was here said, that "to allow the judgment of affirmance to embrace the amount of the original judgment, would be to allow two judgments for the same debt—might in some cases oppressively accumulate interest—and would lead to an onerous and unnecessary multiplication of liens upon the debtor's property. Hence it has become the established practice, and is settled by the court of appeals as the only proper practice, to exclude from the judgment of affirmance all sums and amounts secured by

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the judgment in the court below." But the objection involves a question of practice merely, to be corrected by the supreme court, in case the respondent shall seek to enforce a double collection of costs.

The error being one of practice merely, constitutes no ground for reversing the judgment appealed from. Such judgment, as pronounced, was entirely correct, and the error consists in the form merely in which it was sought to be carried into effect. If necessary the supreme court will hereafter correct the error.

The judgment must be affirmed, with costs.

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COURT OF APPEALS.

THE MAYOR, &c., OF NEW YORK, respondent agt. THE EXCHANGE FIRE INSURANCE COMPANY, appellant.

The provision in the amended charter of the city of New York, imposing on the *Law Department* the duty of conducting all the law business of the corporation, was not intended to disable the city from prosecuting or defending suits *without the consent of the corporation counsel*; nor to deprive it of the ordinary right of suitors, to procure such additional professional aid as the circumstances of particular cases might require.

The city of New York being the owners in fee of the lots upon which the late Crystal Palace building was erected by the lessees from the city for a term of years, which lease having expired, and the possession of the lots and building having been surrendered to the city; and the city thereafter procured a policy of insurance upon the building substantially corresponding with previous policies which had been issued upon the building:

Held, that the city had an *insurable interest in the building*, which entitled them to recover upon the policy, after the destruction of the building by fire:

Held, also, that the premium having been adjusted by the assurers with reference to the nature of the risk, they could not justly complain that the property was dedicated to the uses contemplated by them as well as the assured, and embraced in the descriptive terms of the policy.

September Term, 1867.

APPEAL from judgment of the superior court of the city of New York, affirming judgment in favor of the plaintiffs on the verdict of a jury, for \$6,164.70.

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The action was on a policy of insurance issued by the defendant to the plaintiffs, on the 23d of June, 1858, and covering the "*Crystal Palace*" building, which was destroyed by fire on the 5th of October following. The principal grounds of defense were, that the suit should have been brought by a different attorney; that the corporation had no interest in the building which it paid the defendant for insuring; and that the policy was forfeited by the continued use of the building for the purposes for which it was erected.

On the trial before Judge WOODRUFF and a jury, it appeared, among other things, that the lots on which the building was constructed, belonged to the city of New York in fee. On the 23d of March, 1852, the premises were leased for a term ending in January 1857, at a nominal rent of one dollar a year to Edward Riddle, in behalf of himself and his associates, for the purposes of the association for the exhibition of the industry of all nations, and the lease was assigned to that association, upon the completion of its organization, a few days afterwards. It appears on the face of the lease, that the inducement to its execution was the proposed erection on the vacant lots demised, of "a building of iron and glass, for the purpose of an industrial exhibition of all nations," and upon the stipulation that the lessees should make such erection, and surrender the premises at the expiration of the term, in as good state and condition as reasonable use and wear thereof would permit, damages by the elements excepted.

The building was accordingly erected, and until its destruction in 1858, it was always used for the purposes of industrial exhibitions, and for no others, except such as were incidental and appropriate to that object. This use involved the collection and operation within the building, of various kinds of machinery and other industrial agencies, and the exhibition of a great variety of articles, which would ordinarily fall in the classes of hazardous, extra hazardous, and special risks; and the premium of insurance was fixed with reference

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to the contemplated use, and the known character of the risks. On the 15th of December, 1854, this porperty, with the other effects of the Crystal Palace Association, passed into the possession of John H. White, as receiver, and on the 31st of May, 1858, the term having expired, the city took pos- session, and the receiver surrendered it. The title and pos- session of the plaintiffs are unquestioned, except by the defendant.

The purposes for which the building was always used, and the character of the articles and machinery exhibited within it, were generally known. The defendants, under their former corporate title of the Lafarge Fire Insurance Company, had repeatedly insured the building and its contents. They issued such a policy to the receiver in September, 1856, which was renewed in November, December and January. They issued another in June, 1857, which was renewed in March, 1858, and the officers of the company were informed on occasions of issuing such policies, of the fair of the Amer- ican Institute being held there, as a reason for effecting the insurance.

The descriptions in these successive policies substantially corresponded with that to the plaintiffs in the policy of 23d June, 1858, and the premium of \$75 on the last policy for a year's risk of \$5,000, was at the same rate with the premiums previously exacted. The policy described the insu- rance "on the iron and glass building known as the Crystal Palace, situated on Reservoir Square, between Fortieth and Forty-second streets, and on the east side of Sixth avenue, in the city of New York, together with the furniture and fix- tures now in the said building, lately owned by the associa- tion for the exhibition of the industry of all nations, and since vested in John H. White, as receiver; and also such other property lately vested in said White's hands as receiver, belonging to exhibitors, and lately in said White's custody and keeping, now remaining in said building."

The policy contained the usual printed provisions and con-

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ditions of insurance. The terms of the policy corresponded substantially with that of the lease from the city to the American Institute, which was made about the same time, at a rent of \$6,100 a year.

The fire occurred some three months afterwards, and the plaintiffs claimed only to recover in respect to the building, on which the loss largely exceeded the insurance.

The building was a permanent structure, covering some three acres of ground, connected in all its parts, and constructed on solid and fixed foundations.

Other facts appeared, which it is not material to state. The jury found for the plaintiffs, and the judgment was affirmed at the general term, the opinion of the court being delivered by BARBOUR, J.

JOHN W. EDMONDS, *for appellants.*

DANIEL LORD and T. H. RODMAN, *for respondents.*

PORTER, J. There is no force in the objection that the attorneys who appear for the plaintiffs are not connected with the city law department. The provision in the amended charter, imposing on that department the duty of conducting all the law business of the corporation, was not intended to disable the city from prosecuting or defending suits without the consent of the "corporation counsel," nor to deprive it of the ordinary right of suitors, to procure such additional professional aid as the circumstances of particular cases might require.

In this case it appears affirmatively, that the action was brought with the assent of the corporation counsel, but if there had been no proof on the subject, the authority of the attorneys would be presumed.

The objection that the plaintiffs had no insurable interest, is equally unfounded. The Crystal Palace building, as well as the land on which it stood, belonged to the corporation. There is nothing in the terms of the expired lease, or in the

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evidence introduced by the defendants, to give color to the claim they set up in behalf of persons known or unknown, as an excuse for refusing payment, while they retain the premium of insurance.

The judge was right in admitting proof that the defendants had insured the property for years, and knew, the purpose for which the structure was erected, the manner in which it was occupied, the general character of its contents, and the nature and extent of the risk. These extrinsic facts were appropriate, as they tended to aid the court in applying the descriptive language of the policy to the actual subject of insurance, and in giving effect to the words of the contract, in the precise sense in which they were understood and employed by the parties. (*Bidwell* agt. *Northwestern Insurance Co.* 24 N. Y. R. 302; *Agawam Bank* agt. *Strever*, 18 *Id.* 509; *Blossom* agt. *Griffin*, 13 *Id.* 569; *French* agt. *Carhart*, 1 *Id.* 102.)

When the policy is read in the light of the antecedent and surrounding circumstances, the import of the written language is in harmony with the manifest intention of the parties. The contract covered, and was designed to cover, the hazards incident to the occupation of the building for the purpose of exhibiting to the public the general processes and results of human skill, in each of the various departments of action and practical industry. The premium was adjusted by the insurers with reference to the nature of the risk, and they cannot justly complain that the property was dedicated to the uses contemplated by them, as well as the assured, and embraced in the descriptive terms of the policy. (*Harper* agt. *Albany Insurance Co.* 17 N. Y. 197; *Townsend* agt. *Northwestern Ins. Co.* 18 *Id.* 174; *Hoffman* agt. *Aetna Insurance Co.* 32 *Id.* 405.)

Other questions were raised on the argument, but we think none of them call for particular discussion. The rulings of the judge were correct, and the liability of the defendants is clear.

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The judgment should be affirmed, with costs.
All the judges concurring.
Judgment accordingly.

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SUPREME COURT.

JOHN M. BATTERMAN agt. ARCHIBALD FINN.

Where a defendant, the owner of a water power, is restrained by injunction—himself, his agents, servants, &c., from so using the water in the stream as to throw back water upon the wheels of the plaintiff's mill standing on the same stream—he cannot escape liability for a violation of the injunction, by leasing the premises to other parties, and informing them at the time that an injunction is in force—the lessees taking possession under the lease, and thereafter violating the injunction.

The lessees are the servants and agents in possession under the defendant; and so far as the relation of landlord and tenant is concerned, their possession is his possession; and although as landlord he would not ordinarily be liable for their wrongful and negligent acts as tenants, yet permitting and consenting to their going into possession, with a knowledge that the water power could not be profitably employed without infringing upon the plaintiff's rights and the injunction, he must be held in law as a participant and a privy to their acts. Besides, the circumstances of letting property thus situated, with full knowledge of a difficulty of such a character, should make him liable.

It being only by the authority of the defendant that the lessees had any rights whatever; and in assuming to control the water power, and in violating the express prohibition of the injunction, of which they had notice, they must be considered as his agents and servants, and as such amenable for their own acts; and although not named as parties individually in the action, yet they virtually are such. If agents and servants, they are clearly covered by the injunction; and the authorities which hold that an injunction can only issue against the parties, can have no application. The lessees should, therefore, be held liable for their violation of the injunction.

Albany General Term, December, 1864.

Before PECKHAM, MILLER and INGALLS, Justices.

APPEAL from two orders made at special term adjudging that the defendant and Rundle, one of the firm of Ruggles & Rundle, who hired the defendant's premises, and was in possession from first of —, to about the 18th of July, 1862, and Guessner & Taylor, who were also the tenants of the defendant, and were in possession from October 1, 1862,

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until the 18th day of October, 1862, were guilty of a contempt in violating the injunction order made in this action, restraining the defendant, his servants, agents, &c., from so using the water in the stream on which the plaintiff's mill stands, and his (defendant's) mill is located, as to throw back water upon the wheels of the plaintiff's mill.

R. W. PECKHAM, JR., *for appellants and defendants.*

C. B. COCHRANE, *for respondent and plaintiff.*

By the court, MILLER, J. The injunction issued in this action, was personally served upon all the parties to this motion except Ruggles. Rundle left the possession of the premises soon after it was served, and Ruggles a few weeks after that. It was read to Ruggles by Rundle, immediately after the service. He said at the time that the injunction did not amount to anything ; that he cared nothing about it, but should keep up the water as high as it had been, let the consequences be what they might. Repeatedly afterwards he made use of similar language. All the parties had frequent and repeated notice of its existence, and full knowledge of its authority ; and those who were engaged in violating its commands, did so without any sort of excuse, and fully aware that in so doing they were guilty of an infringement upon the rights of the plaintiff. If, therefore, they escape the consequences of their own acts upon these motions, it must be upon the strictest technical grounds, and for the reason that the law furnishes no relief in such a case, by a proceeding in an action to which they are not parties. The defendant asks to be excused, because the other parties were his tenants. The latter claim exemption for the very same reason, and also because they are not nominally parties to the suit. If either are correct, then the plaintiff is remediless, unless he seeks other modes of redress besides the suit which he has instituted against the defendant, to protect and enforce his rights.

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The original injunction issued in this action, was directed to the defendant and his agents, servants, &c., and if the other parties are embraced within its reach, they must be so held upon the ground that they were the *agents and servants* of the defendant, and connected with him in its violation.

An injunction to restrain proceedings at law, is usually directed to the defendant, his counsellors, attorneys, solicitors and agents; and an injunction to restrain waste, &c., is usually directed to the party, his servants, workmen and agents; consequently, if the counsellors, &c., of the party in the first case, or his servants, workmen or agents, in the second, having notice of the injunction, do anything inhibited by it, they will be held guilty of a contempt. (*1 Barb. Ch. Pr.* 634; *3 Dan. Ch. Pr. and Pl.* 1907; *Lewis agt. Morgan, 5 Price,* 518.)

As to the defendant in this case, he was the owner of the premises, which he leased to the other parties, and had full knowledge of the injunction, and the difficulty in regard to the use of the water. He placed the other parties in possession, and received rent from them. At the time he hired the premises, he informed them that an injunction was in force. I think that this was not enough to exonerate him from liability for their unlawful acts. Knowing as he did all about the matter, if he had desired to protect himself, he should at least have required an indemnity against any violation of the order. Having the entire control, it was his duty to see that the order was not violated. He received the fruits for the use and enjoyment of the premises. The occupants were his servants and agents, in possession under him, and so far as the relation of landlord and tenant was concerned, their possession was his possession. Although as landlord, he would not ordinarily be liable for their wrongful and negligent acts as tenants, yet permitting and consenting to their going into possession as he did, with a knowledge that the water power could not be profitably employed without infringing upon the plaintiff's rights and the injunction, I think he must be held

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a participator, and as a privy to their acts. In knowledge he was in privity with them. They had no rights except what were derived from him, and if he was permitted to confer upon them, directly or individually, authority to do what he was absolutely enjoined to refrain from doing, or if they were allowed to do so without authority, it would tolerate an entire evasion of the order of the court.

It is said that the defendant neither directed or advised the other parties to use the water improperly, but cautioned them against so doing. This is true in point of fact, and the result of the act itself, with the concomitant circumstances, including the changes of occupation within a very brief period, evinces that it was a perilous undertaking—a very doubtful enterprise, thus to place the property out of his hands. I think that he had reason to believe that the contingency would happen which actually did occur, and although not distinctly manifest, yet an act of this kind might well be done for the very purpose of evading the order of the court. I also think that the circumstance of letting property thus situated, with full knowledge of a difficulty of this character, should make a party liable. The fact itself is sufficient to show *privity*, and to hold the party responsible for procuring the act to be done. If it can be sanctioned, then it is only necessary for a defendant thus enjoined, to relieve himself, by making an arrangement to put another party in his place, thus entirely disregarding and setting aside the power of the court. The defendant had no right thus to exempt himself from responsibility. If not an evasion in point of fact, it was so in law, so long as he was receiving an income for the unlawful use of the property.

In my opinion, it is no answer to say that the tenants could be sued alone for the injuries inflicted. Such a proceeding would seriously delay and embarrass the aggrieved party, and to a very great extent, prevent the successful accomplishment of the object intended by the suit in progress.

There is no good reason why a party should thus be driven

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to seek a remedy against others who may have foisted themselves in by the consent of the defendant; and I am inclined to hold, that a party under an injunction restraining him from the commission of an alleged wrong, has no right to divest himself from its efficacy and effect by introducing new parties, from whom he is in the receipt of a recompense, and who in the face of light and knowledge, duly advised of the rights of others, persist in pursuing a course of conduct for which he has been enjoined. The fact itself that they do so, makes him amenable for their conduct, and it must be assumed that it is done with his privity, knowledge and assent. If the defendant had parted absolutely with his title, retaining no interest whatever, and received no rent for the wrongful use of the premises, it would have altered the case very materially; but as such was not the fact here, he is not entitled to avail himself of a supposed case which does not actually exist.

As to the other parties: they were tenants, paying rent, fully advised of the existence of the injunction. They have not the advantage of pleading ignorance of the plaintiff's rights. They were in possession under the defendant, assuming to control the premises by virtue of his license and permission. In privity with him they took possession, ostensibly for the purpose only of enjoying and exercising his legal rights, and violated the injunction, fully advised of the plaintiff's rights. They had no authority except under their lease thus to act, and if they were wrong-doers, they were made such by the act of the defendant in introducing them to such a position. It was by the defendant alone that they were placed in such an attitude, by means of which they infringed upon the plaintiff's rights, and without his consent they had no power whatever. They were not intruders, who could be regarded as trespassers *de novo*, because they acted under a license from the defendant. They were there by authority, the chosen representatives of the defendant, in the use of the water power; his agents and servants, to whom the injunction

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was especially directed, and were controlled by, and embraced within its mandates. The defendant had placed them there, informing them at the time of the existence of the injunction. It was only by his authority that they had any rights whatever, and in assuming to control the water power, and in violating the express prohibition of the injunction, I think they must be considered as his agents and servants, and as such amenable for their own acts. Although not named as parties individually, yet they virtually were such. If agents and servants, they were clearly covered by the injunction, and the authorities which hold that an injunction can only issue against the parties, can have no application.

If it were otherwise, an injunction could easily be avoided by placing other persons in possession of property ; multiplicity of suits would be necessary to enforce it, and its main object frustrated and put at defiance. While care and caution should be observed in issuing orders of this character, yet when a case is made out which authorizes the granting of an injunction, and it is issued and served, courts should see that it is strictly enforced, and that its object is not thwarted by legal artifice, or by subterfuge.

The injunction in this case appears to have been served personally upon all but one of the parties, and he had full notice of it. It is not, however, in my opinion, essential that the service should have been personal upon the tenants, by the delivery of a copy, and by showing the original, in order to bring them into contempt. Regarding them as parties, as they really were, being the agents and servants of the defendant, it was quite sufficient that they had notice. If the defendant or his attorney is present in court when the motion is made, the party may be held liable for a contempt. (*2 Mad. Ch. Pr.* 225.) And when an order is served upon the solicitor, if knowledge of such service is brought home to the party, he will be in contempt for not obeying the order, in the same manner as if it had been served on him personally. (*4 Pa.* 405.)

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The tenants here disobeyed the injunction, to the annoyance and great injury of the plaintiff, without any kind of an excuse, and I see no good reason why they should not be held liable. They were not third parties, strangers to the original injunction, but came in by the procurement of the defendant, and assumed to control the water power, the same as if originally owners of it.

Where parties act thus, with an entire understanding of the facts, as was done in this case, there is no harshness in holding them to a rigid and strict accountability. They have committed the injury ; there is no doubt of their liability in some form, and as they have been fully heard before the referee appointed for that purpose, they have no reason to complain that another suit has not been instituted to obtain redress. They have not the same claims to exemption and to consideration, which the court will always accord to innocent parties, and if compelled to make remuneration for the damages done, it is only a necessary consequence of their own illegal and deliberate acts.

The principle involved in this case is of considerable importance, and unless it can be upheld, the process of injunction will become an idle ceremony, impotent for any good purpose. A party may easily free himself from its restraint by substituting others in his place, without incurring any responsibility. And those thus substituted, although fully advised of all the facts at the time, may also escape by insisting, as is done here, that a new proceeding shall be instituted to bring these parties before the court.

I see no justice, propriety or legality in such lame and impotent excuses, and am satisfied that there was no error in the decision of the special term.

The orders should, therefore, be affirmed, with costs of the appeal, upon each motion.

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COURT OF APPEALS.

SARAH L. COOK, an infant, &c., respondent agt. SAMUEL M. MEEKER and WILLIAM CONSELYEA, appellants.

At common law, the general rule is that *interest upon a legacy* is payable only at the expiration of a year from the testator's death.

But where a sum is left in trust, with a direction in the will that the interest and income should be applied to the use of a person, such person is entitled to interest thereof from the date of the testator's death. Especially is this so, when by the will it appears clearly to have been the intent of the testator that the legacy should be paid by a transfer of bonds and mortgages bearing interest at the time of his death. (GROVER, J. dissenting.)

January Term, 1867.

J. H. REYNOLDS, *for appellants.*

S. C. PINCKNEY, *for respondent.*

DAVIES, CH. J. The appellants were constituted the executors of the last will and testament of Joseph Conselyea, deceased, and separate trustees of certain sums given in and by the will, for the use of certain beneficiaries therein named

By the fifth clause of his will, the testator gave and bequeathed to his son, William Conselyea, one of the appellants, the sum of \$5,000, upon trust, to invest the same upon bond and mortgage, and apply the interest and income thereof to the use of his grand-son, Joseph Cook, during his natural life.

By the sixth clause of the will, the testator gave and bequeathed to the appellant Meeker, the sum of \$3,000, upon trust, to invest the same on bond and mortgage, and apply the interest and income thereof to the use of his granddaughter, Anna Cook, during her natural life. And by the seventh clause of the will, the testator gave and bequeathed the further sum of \$3,000, upon trust, to invest the same on bond and mortgage, and apply the interest and income thereof

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to the use of his grand-daughter, Sarah Cook, the plaintiff herein, during her natural life.

The testator declared in and by his will, that in case any claim or demand should be presented and allowed against his estate, in favor of Dr. Chauncey L. Cook, that the same should be paid rateably out of the principal of the several sums given and bequeathed to the said Conselyea and Meeker, respectively, in trust for the use, benefit and behoof of the children of the said Chauncey L. Cook. All the rest, residue and remainder of his estate, real and personal, he gave to his son, William Conselyea. He authorized and empowered his executors to pay and discharge the several legacies and bequests made in his will, or any or either of them, by transferring and delivering to the several legatees such bonds and mortgages belonging to his estate, to be selected by his executors, as might amount either severally or collectively to the legacy paid off.

In addition, the following facts were found by the court which tried the case, without a jury: That the testator died on the 10th of October, 1856, and that letters testamentary were issued to the defendants on the 20th of December, in that year. That the testator left bonds and mortgages amounting to the sum of \$39,121, and that they were drawing interest at the time of the testator's death. That the amount of the legacies and bequests was \$21,000 given by the will. That there were no debts against the estate except the demand of Dr. Cook, mentioned in the will. That the estate was ample to pay all legacies. That there was a large real and personal estate drawing interest. That the executors took possession and control of said estate from the time of the testator's death. That the lands and mortgages set apart for the payment of these bequests, were part of the estate left by the said testator, and were drawing interest at and from the time of the testator's death. That on the third day of June, 1857, Dr. Cook presented to the executors a claim against the testator, duly verified, amounting to \$426,

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which was afterwards allowed by them, and paid to him on the 19th of December, 1857. That by the terms of the will three-sevenths of this claim, amounting to the sum of \$116.18, was directed to be paid out of the principal sum of \$3,000 bequeathed to the use of the plaintiff.

That on the 19th of December, 1857, the defendant Meeker received from the executors, for the use of the plaintiff and her sister Ann, for life, the sum of \$5,767.64, of which \$5,691 was in mortgages, and \$76.64 in cash.

The plaintiff claimed the interest on said sum of \$3,000, from the time of the death of the testator, and the defendants insisting that she was only entitled to the interest and income thereof from the 19th day of December, 1857.

The judge at special term held, that the money bequeathed to the use of the plaintiff was a legacy, and was not payable until the expiration of one year from the granting of letters testamentary, and that the plaintiff was not entitled to interest thereon prior to December 20, 1857. Judgment was entered dismissing the complaint, and an appeal to the general term reversed the judgment, and ordered a new trial. From this order the defendants have appealed to this court, and stipulated that if the order appealed from is affirmed, that judgment absolute shall be rendered against them.

There does not appear to be much difficulty in adjusting the rights of the parties, and the defendants would have been held blameless if they had acquiesced in the judgment of the general term of the supreme court, that the plaintiff was entitled to the income of the same, set apart by the testator for her support and maintenance, from the time of the death of the testator. The amount in controversy hardly justified them in subjecting the plaintiff, or the estate they represent, to the delay and expense of an appeal to this court.

A bare reading of the will shows that the testator had two classes of beneficiaries in his mind, one to whom he intended to give absolute legacies, and the other those for whose support and maintenance he intended to provide a fund, for which

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purpose the interest and income thereof were to be applied. In the former class, was the bequest of the sum of \$6,000 to his wife, the sum of \$2,000 each to the two children of his son William, the sum of \$3,000 each to his two grand-children, Anna L. Baker and Micajah R. Pinckney. In the latter class, is the bequest of the sum of \$4,000, the interest and income of which was to be paid to his wife during her natural life ; the sum of \$5,000, the interest and income of which was to be paid to his daughter married, during her natural life ; the sum of \$5,000, the interest and income of which was to be applied to the use of his grand-son, Joseph Cook, during his natural life ; the sum of \$3,000, the interest and income of which was to be applied to the use of his granddaughter, Anna Cook, during her natural life ; and the sum of \$3,000, the interest and income of which was to be applied to the use of his grand-daughter, Sarah Cook, the plaintiff, during her natural life.

By the provision of the Revised Statutes, no legacies are to be paid until after the expiration of one year from the time of granting letters testamentary, unless the same are directed by the will to be sooner paid. (*2 R. S. p. 90, § 43.*) This is an affirmation of the doctrine of the common law, and has not changed the rule as to the time when interest on legacies begins to run. (*3 Brad. Rep. 364.*)

At common law, the general rule is that interest upon a legacy is payable only at the expiration of a year from the testator's death. (*Toller on Ex. 324 ; Bradner agt. Faulkner, 12 N. Y. R. 472.*) If, however, an *annuity* be given, or if by implication from the terms of the instrument, the legacy be given for maintenance and support, it shall commence immediately from the death of the testator, and consequently the first payment shall be made at the expiration of the year next after that event. (*Toller on Ex. 324 ; Bradner agt. Faulkner, ubi supra ; 6 Vesey, 539 ; 6 Paige, 300.*) A learned author on the duties of executors (*2 Williams on Ex. 1288*) says : This rule as to the payment of interest, is subject to an

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exception, in case where the testator being a parent, or stands *in loco parentis* to the legatee. (*Citing Ackerly* agt. *Vernon*, 1 *P. Wms.* 783; *Hill* agt. *Hill*, 3 *V. & B.* 183; *Miles* agt. *Roberts*, 1 *Russ. & M.* 555; *Leslie* agt. *Leslie*, *Cas. Temp. Sugd.* 4 *Lloyd & Goold's Rep.*; *Rogers* agt. *Souther*, 2 *Keen*, 508; *Wilson* agt. *Maddime*, 2 *Y. & C. Ch. C.* 372; *Russell* agt. *Dickson, Dr. & W.* 133.) For then, whether the legacy be vested or contingent, if the legatee be not an adult, interest on the legacy shall be assumed as a maintenance from the time of the death of the testator, if there is no provision for that purpose (*Harvey* agt. *Harvey*, 2. *P. Wms.* 21; *Inclondon* agt. *Huthcote*, 3 *Atk.* 438; *Chambers* agt. *Godwin*, 11 *Ves.* 2; *Brown* agt. *Townsley*, 3 *Rup. Ch. Cases*, 263); and even though the will should contain an express direction that the interest should accumulate. (*Mole* agt. *Mole*, 1 *Dick.* 310; *McDermott* agt. *Kealey*, 3 *Rup. Ch. Cases*, 264, note; *Wynch* agt. *Wynch*, 1 *Cox*, 433; *Donorean* agt. *Needham*, 9 *Beavan*, 164; *Rudge* agt. *Wirmall*, 12 *Beavan*, 357; *In re Rouse Estate*, 9 *Hare*, 649.) In *Miles* agt. *Roberts* (*supra*), the testator gave legacies to be paid to two minor children, provided they attained the age of twenty-one years, and the question was, whether they were entitled to interest on their legacies of \$10,000 each for their maintenance and education during their minorities; and he also gave a legacy to one George Francis Stuart, a minor, for his sole use and disposal, provided he attains the age of twenty-one.

The master of the rolls said, the testator appoints two gentlemen to be trustees and guardians of these children, and requests them to attend to their education; and the case of *Brampton* agt. *Wilkinson*, is an authority directly in point, that they are entitled to the interest of the sums given to them until they attain the age of twenty-one, or die under that age. The same principles apply to the legacy to George Francis Stuart.

This is a strong case, showing the extent to which the court of chancery in England has carried the doctrine of applying

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the income or interest of a legacy payable at a future period, given to a minor for his maintenance and education, even before the time arrives when the legacy is payable

The weight of authority, undoubtedly, now is in favor of allowing the payment of annuities or incomes to commence at the testator's death. The chancellor assumes this in *Craig* agt. *Craig* (3 *Barb. Ch.* 6), referring to *Gibson* agt. *Bott* (7 *Ves.* 96); *Fearnless* agt. *Young* (9 *Id.* 553); *Rebecca Owing's Case* (1 *Bland. Ch. Rep.* 296). The case of *Augustein* agt. *Martin* (*Sm. & Russ. Rep.* 232), came before Lord ELDON, in 1823. The testator in that case devised his freehold estates to J. Augustein for life, with remainder to his children, in strict settlements; and as to his residuary personal estate, he bequeathed the same to trustees, to be invested in the purchase of lands, to be settled in the same manner, with authority to invest the funds in stocks, etc., until the estates could be purchased; the interest or income to go to the same person or persons to whom the rents of the estate would go if the purchase had been made. The tenant for life filed his bill *within the year* after the testator's death, for the purpose of having the question decided whether he was entitled to the annual interest of the clear residue of the personal estate from the testator's death, or whether the amount of such interest for the first year was to form a part of the capital of the general residue, and which was to be added to the same, and invested, and upon a review of all the previous cases, it was decided that the interest from the death of the testator belonged to the tenants for life, and was not to be added to the residue for the benefit of those who were entitled to the estates in remainder in the property to be purchased. And in the case of *Hewitt* agt. *Morris*, which came before Lord ELDON, a few months afterwards (*Town. & Russ. Rep.* 241), the testator directed his executors to invest the residue of his estate, after payment of debts and legacies, in the funds or upon securities, the interest to be paid to A.

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for life, and after his death, the principal to be held upon trust for his children.

The tenant for life was held to be entitled to interest accruing within the year next after the testator's death, upon funds in which the testator's property stood invested at the time of his death, and which were not required for the payment of debts and legacies.

And it is to be observed that in each of these cases, the interest and income were decreed to commence before the exact amount of principal fund was ascertained. (*See also Bickford agt. Tobin*, 1 *Ves.* 308; *Hill agt. Hill*, 3 *Vesey & Beames*, 183.)

Chancellor WALWORTH, in *Williamson agt. Williamson* (6 *Paige*, 304), after a citation and review of the authorities, observes that "the result of the English cases appear to be, and I have not been able to find any in this country establishing a different principle, that in the bequest of a life estate in a residuary fund, and where no time is prescribed in the will for the commencement of the interest, or the enjoyment of the use or income of such residue, the legatee is entitled to the interest or income of the clear residue, as *afterwards ascertained*, to be computed from the time of the death of the testator. All the cases which appear to conflict with this rule, except the two decided by Sir JOHN LEACH, which are no longer to be considered as authority, will be found to be cases in which the testator had directed one species of property to be converted into another, or the residue of any fund to be invested in a particular manner, and had then given a life estate in the funds, as thus converted or invested. In such cases, it appears to be consistent with the will of the testator to consider the life interest as commencing when the conversion takes place, or the investment is made, either within the year, or at the expiration of that time. But as a year is considered a reasonable time for the executor to comply with the testator's directions as to the conversion or investment, the legatee for life cannot be kept out of the inter-

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est or income beyond that period. In the case made considerative, there is no direction for the investment thereof in any particular manner, before the right of the widow to the use thereof for life was to commence, and as it appeared that a great portion of the personal estate was in bonds and mortgages, and other securities, which were drawing interest at the death of the testator, there is no good reason for depriving the widow of the use of the residuary estate for an entire year." These remarks apply with peculiar force to the case now made considerative. Here there is no direction for a conversion, but a direction in effect to transfer the bonds and mortgages of the testator, to the amount of the several bequests, in satisfaction of them. These securities were all bearing interest, and it is manifest that it was the intent of the testator that these several beneficiaries should have the interest and income of the amount separate for them, for their maintenance and education. And the fact that the precise amount of the funds was not ascertained until the expiration of a year from the death of the testator, furnishes no reason why the interest therein should not be paid to the beneficiary before that time. *In re Williams* (12 Legal Observer, 179), the surrogate of Kings county allowed interest to an adopted daughter of the testator, on a sum of \$5,000 directed to be invested, and the interest to be paid to her during life on the proportionate share of her legacy from the death of the testator, but he refused to allow interest from the same period to the widow of the testator, upon a legacy to be invested, and the interest thereof paid to her. *In matter of Fisk's Estate* (19 Abb. Pr. Rep. 209), the surrogate of New York in 1865, decided:

That annuities, or incomes and interest upon sums directed to be invested upon trust, to pay over interest or income, commence to run from the death of the testator.

The case of *Hillyard Estate* (5 Watts & Sergt. 30), is quite in point. There the bequest was to the executors in trust, to put at interest a certain sum, and apply the interest and income thereof to the sister of the testator. The court held, that she

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was entitled to the interest upon the sum so held in trust during the first year of the testator. It is a significant fact that the statute laws of Pennsylvania, in relation to the payment of legacies, conforms to that of this state directing their payment at the expiration of a year from the death of the testator. See also for the same doctrine *Eyre agt. Golding* (5 *Binn.* 472).

The authorities would seem abundant, therefore, to sustain the doctrine that where a sum is left in trust, with a direction that the interest and income should be applied to the use of a person, such person is entitled to the interest thereof from the date of the testator's death. Especially is this so, when, as in the will under consideration, it appears clearly to have been the intent of the testator that the legacy should be paid by a transfer of bonds and mortgages bearing interest at the time of his death. All the authorities and *dicta* concur, that under such circumstances, the accruing interest upon the securities, from the time of the death of the testator, should go for the use and maintenance of the beneficiary.

It follows from these considerations, that the order of the general term granting a new trial should be affirmed, with costs, and in pursuance of the defendants' stipulation, judgment absolute should be rendered for the plaintiff, and the supreme court is directed to ascertain the amount due to the plaintiff on the principle of this opinion, and render judgment therefor, with costs.

All concur except GROVER, J., who dissents, and PORTER, J., who having been of counsel, takes no part.

Judgment affirmed.

BOCKES, J. At common law, when a legacy was given without specifying any time of payment, it vested in the legatee on the death of the testator, though not payable until one year afterwards. The legacy vested on the decease of the testator, at which time the will was deemed to speak or take effect. By the statute (2 R. S. 90, § 43), legacies are not payable until after the expiration of one year from the time

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- of granting letters, unless directed by the will to be sooner paid, and they will not draw interest until legally payable. (12 N. Y. 472.) Therefore, interest is not payable on a legacy until a year from the granting of letters, unless it be otherwise directed in the will, either expressly or by fair implication. In this case no express direction is given, but according to well settled rules of construction, direction is given by just and fair inference.

The testator gave to the defendant Meeker, \$3,000 in trust, to invest the same on bond and mortgage, and to apply the interest and income thereof to the use of the plaintiff during her life. The plaintiff was a minor, and so far as the case shows, was without other provision for her support and maintenance. The testator's personal estate exceeded the aggregate of all the legacies, and was well invested on bonds and mortgages drawing interest; and he gave authority to his executors to pay and discharge the legacies and bequests made in the will, by transferring and delivering bonds and mortgages belonging to his estate, to the legatees. Certainly there was nothing in the will, or in the circumstances surrounding the case, rendering it impossible or improbable that it was the intention of the testator that the legatee or beneficiary under the trust should not have the income from the fund named by him from the time of his decease. On the other hand, the inference is fair that he so intended. It is apparent that the bequest was intended for the support and maintenance of the plaintiff, who was an infant; and there is no reason, nor is it probable, that he intended to postpone benefit conferred, for any period after his decease. In case of a legacy to a widow in lieu of dower, it draws interest from the death of the testator, when he has made no other provision for her support during the first year after his death (6 *Paige*, 278); and so in the case of a legacy to a child, whose support and maintenance are not otherwise provided for. (1 *Allen*, 490.) The construction claimed for this will by the plaintiff, is sustained by numerous authorities, both in

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England and this country. (7 *Vesey*, 96; 9 *Id.* 553; 1 *Bland's Ch.* 296; *Barb. Ch.* 76; 6 *Paige*, 298; 5 *Watts & Sergt.* 301.)

The last case cited is much like the one in hand. The testator gave to his executors a sum in trust, to be put at interest, and required them to apply the interest and income to the use of his sister during her natural life. It was held that she was entitled to interest on the sum from the death of the testator. So in *Gibson* agt. *Bott* (7 *Vesey*, 96), the testator placed the residue of his property in trust, in the hands of his executors, and directed them to keep it invested, and to pay the interest and dividends to his two daughters and their assigns, for life. It was held that they were entitled to the interest thereon from the testator's decease. The case under consideration is stronger in favor of the plaintiff's claim than are some of those cited, in which it was held that the beneficiary under the will was entitled to interest from the death of the testator. Here all or nearly all the circumstances exist and are combined, which in the cases cited were severally held to control the construction of the will, and to indicate plainly the intention of the testator.

The estate was much more than sufficient to satisfy all the legacies.

It was well invested on bonds and mortgages, drawing interest at the testator's decease. The executors were authorized to transfer existing securities in satisfaction of the legacies. One of the executors was made the trustee to take and hold the trust fund—thus no new or especial investment was necessary. The beneficiary was an infant, with no other provision for her support, or means of support, so far as the case discloses. In view of these facts, and in accordance with well settled rules of construction in analogous cases, it must be held that the plaintiff is entitled to interest on the trust fund from the decease of the testator.

The order of the supreme court granting a new trial was

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right, and must be affirmed; and under the stipulation judgment final must be rendered in favor of the plaintiff.

The case, however, must go back to the special term, for the purpose of fixing the amount for which judgment is to be entered.

See leading opinion by Davies, J.

GROVER, J., dissenting. The only question arising upon this appeal is, whether the plaintiff was entitled to interest upon the sum to be invested for her benefit, from the time of the death of the testator, or not until a year after the probate of the will. Section 43, page 90, second Revised Statutes, provides that no legacies shall be paid by any executor or administrator, until after the expiration of one year from the time of granting letters testamentary or of administration, unless the same are directed by the will to be sooner paid. There is no such direction found in the will of the testator, unless it is to be inferred from the discretion given to the executors to pay the same in bonds and mortgages belonging to the estate, or from the fact that such bonds and mortgages were drawing interest at the death of the testator, or from both of these facts. It is clear that such direction cannot be inferred from the discretion given to the executors as to the manner of payment. They were left at liberty to make payment in cash or mortgages, and it would be absurd to hold that if they chose to pay cash, they were entitled to the year, but if they elected to pay in mortgages, such payment must be made immediately. Neither can such direction be inferred from the fact that the assets were drawing interest at the death of the testator. Such must be the condition of a portion at least of the assets of all large estates. In some form an income is produced by the property, or a large portion of it, and yet in no case has this been considered as entitling a legatee to interest until the lapse of a year from the probate of the will. It furnishes no ground for presuming an intention of the testator that the legacies should be sooner paid than would the part of a surplus remaining after

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payment of all debts and legacies; indeed, the latter part would have a greater tendency to create such presumption than the former, where the estate was sufficient for those purposes.

It is clear that if the bequest in the present case is to be regarded as a legacy, the plaintiff is not entitled to interest until the expiration of a year from the probate of the will. This was the conclusion of the learned court below. It was held by that court that this, so far as the plaintiff's right to interest is concerned, must be regarded in the nature of an annuity or income. It has always been the rule that an annuity or yearly income, given by will, should commence (when no time was fixed by the will) from the death of the testator. It is unnecessary to cite authorities for so plain a proposition.

The inquiry then is, whether this bequest is to be regarded as an annuity or income, or as a legacy? If the former, the plaintiff is entitled to interest from the death of the testator; if the latter, she is only so entitled after one year from the probate of the will.

In the absence of authority, I should deem it clear that it was a legacy. It is given to Meeker in trust, for certain purposes; among other things, to invest and pay the interest for the use of the plaintiff for life. Had it been given to Meeker absolutely, there would have been no question but that it was a legacy to him, payable like other legacies. How does the bequest become enlarged by the trusts charged upon it in his hands? Had there been no such charge, he would have been entitled to the money in one year from the probate of the will, and if not then paid, to interest from that time; but it is claimed that the trust imposed (to invest and pay the interest to the plaintiff for life), charges the bequest with interest from the death of the testator.

I am unable to see the force of the argument, that what Meeker is bound to do with the money when received—whether to invest and pay the interest to the plaintiff for life, and then pay the principal to her issue, or whether to pay

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principal to plaintiff upon the happening of any subsequent event, and interest until that time—can have to do with the amount of money he is entitled to receive under the will.

- But it is claimed that the question has been settled in favor of the plaintiff, by the judgment of courts, to an extent that should be deemed controlling by this court. It is conceded that there has been no such determination by the courts of this state. *Craig agt. Craig* (3 *Barb. Ch.*), only determines that an annuity shall commence at the death of the testator. This has nothing to do with the question in the present case ; that is, whether the bequest is a legacy or not.

The case of *Hilliard's Estate* (5 *Serg. & Watts*, 30), decided by the supreme court of Pennsylvania, is a direct authority in favor of the plaintiff. It was there held, under a statute substantially like the statute in this case, that where money was given to executors in trust, to invest, and pay the interest to another, that the sum drew interest from the death of the testator. The decision was based partly upon the ground that the assets were drawing interest at the death of the testator, and partly upon the analogy to annuities, which commenced from the death of the testator. I am unable to assent to the reasoning of the learned court upon either ground. I have before examined the effect to be given to the fact that the assets were drawing interest at the death of the testator, and arrived at the conclusion that it was entitled to no weight. Neither do I perceive any analogy in such a case to an annuity. The money is given upon trust, to invest, and pay the interest to the plaintiff, whether for a longer or shorter time, is immaterial, and then apply the principal as directed. It is a legacy, and nothing else.

The diminution of the principal given, in consequence of the demand presented by Dr. Cook, I do not regard as material. If the bequest of a sum certain, upon trust, as in the present case, should draw interest from the death, I am unable to perceive why a like bequest of an uncertain sum

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should not, when reduced to a certainty, be entitled to like interest.

There was no exception taken to the dismissal of the complaint, or request made to render judgment in favor of the plaintiff for the small balance of interest received by the defendant Meeker, to which the plaintiff is entitled. No such question can be considered in this court.

The judgment of the general term must be reversed, and that of the special term affirmed.

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COURT OF APPEALS.

JOHN A. MERRITT, respondent agt. HORACE BARTHOLICK,
appellant.

Where a mortgagee delivers manually his mortgage to a third person, to secure the payment of a debt of the mortgagor to such person, it does not necessarily follow that the intention of the parties was to transfer the bond.

As a mortgage is but an incident to the debt which it is intended to secure, the logical conclusion is, that a transfer of the mortgage without the debt, is a nullity, and no interest is assigned by it.

The transfer of a mortgage does not of itself operate to transfer the bond, for the legal maxim is, the incident shall pass by the grant of the principal, but not the principal by the grant of the incident.

January Term, 1867.

APPEAL from a judgment of the general term of the supreme court.

PARKER, J. If the delivery of the mortgage, without the bond, to Wentworth, as collateral security for the debt, such delivery was intended to secure, operated as a valid assignment of the mortgage to Wentworth, the judgment below is wrong, and cannot be sustained.

On the other hand, if it conveyed no interest in the mortgage to Wentworth, then the defendant, who claims his title through Wentworth's foreclosure of that mortgage, has no

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defense to the plaintiff's action to foreclose, and no interest in respect to it, which under the facts found by the referee, can avail him upon this appeal.

The single question for consideration then is, did the delivery of the mortgage by Merritt, the mortgagee, to Wentworth, under the circumstances stated in the referee's report, operate to invest Wentworth with any interest in the mortgage?

The referee finds that "on the 16th of July, 1853, or shortly thereafter, the bond and mortgage were assigned by the obligee and mortgagee therein named, to John Campbell, by assignment in writing, which was duly acknowledged and recorded on the 16th day of May, 1863. That prior to the assignment of said bond and mortgage to said Campbell, the mortgagee was indebted to Henry T. Wentworth, in the sum of \$200, borrowed money; that Wentworth desired that said mortgage should be left with him as collateral security for said debt, and that the said Merritt delivered the said mortgage to said Wentworth, according to such request, and as collateral security for said debt of \$200; that the said mortgage was so delivered to said Wentworth before the same was assigned to said Campbell, but that the bond accompanying the same was not delivered to the said Wentworth at the time, nor was anything said about the same, nor is there any evidence that the same was ever delivered to the said Wentworth, nor was there any writing executed in reference to such transfer."

As a mortgage is but an incident to the debt which it is intended to secure (*Martin agt. Mowlin*, 2 *Burr.* 969; *Green agt. Hart*, 1 *Johns. R.* 580; *Jackson agt. Blodgett*, 5 *Cow.* 202; *Jackson agt. Bronson*, 19 *Johns. R.* 325; *Wilson agt. Troop*, 2 *Cow.* 231; *Cooper agt. King*, 17 *Abb.* 342), the logical conclusion is that a transfer of the mortgage without the debt is a nullity, and no interest is assigned by it. The security cannot be separated from the debt, and exist independently of it. This is the necessary legal conclusion, and

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recognized as the rule by a long course of judicial decisions. (*See cases above cited; also 4 Johns. R. 41; 5 Johns. Ch. R. 570; 9 Wend. 80.*)

Unless then the bond was in effect assigned with the mortgage, Wentworth obtained no interest in the mortgage. Did the bond, or the debt which it evidenced, pass to Wentworth? In the first place, the transfer of the mortgage did not of itself operate to transfer the bond, for the legal maxim is, *the incident shall pass by the grant of the principal, but not the principal by the grant of the incident.* So that unless we are authorized to say that such was the intent of the parties, we cannot hold that it did. This is a question of fact, which the counsel for the appellant argues in his points, but unless the referee has found it as a fact, or found facts from which we are bound to infer its existence, it is a question not in the province of this court to determine.

The act done by Merritt, the mortgagee, was the delivery of the mortgage to Wentworth, and the purpose of the delivery was to secure the payment of the debt of the mortgagee to Wentworth. Does it necessarily follow that the intention of the parties was to transfer the bond? The referee has not found either way upon this question of intent, and, therefore, unless the intent in question is to be inferred as a matter of legal necessity from what he does find, it must now be held not to have existed.

If the transfer had been by a written assignment, describing the mortgage alone, and expressing the object to be to secure the debt of the assignor to the assignee, nothing being said about the bond, or the debt which it represents, and delivery of the mortgage made, it would be impossible, I think, to hold that the intention was to assign the bond. There would be no opportunity for an implication to that effect. The circumstance that the assignment would be inoperative unless the bond is held to pass, would not give the assignment that effect. The result of such holding would be to reverse the maxim, and make the principal follow the inci-

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dent. To make the circumstance of its inefficacy a reason for giving it the effect desired, would manifestly uproot the maxim, and establish the contrary rule.

The fact that here the transfer was by manual delivery merely, nothing being said as to the bond or the indebtedness secured by it, does not afford any stronger evidence of the intent to transfer the bond, than the case supposed; there is no circumstance in the case not considered in the supposed case; and, as I think, nothing to compel the inference of the intent to transfer the bond. I am unable to see, therefore, any escape from the conclusion that upon this appeal, the judgment of the supreme court must be held correct, and affirmed.

Concurring—PORTER, BOCKES, DAVIES and SCRUGHAM.

HUNT and GROVER, for reversal.

Affirmed.

—♦—

SUPREME COURT.

FREDERICK JULIAND agt. JUDSON L. GRANT.

Where judgment has been entered in favor of the plaintiff on a *report of a referee*, and the defendant thereupon immediately appeals therefrom to the general term, and serves the necessary papers upon such appeal; and after service of the notice of the appeal, the defendant moves at special term, and procures an order referring the case back to the referee, to *amend his report* in a particular manner specified in the order, or otherwise, as he might think correct, and staying all proceedings in the action on the part of the plaintiff until the referee should amend his report, and giving the defendant thirty days after service of a copy of the amended report to make a case and exceptions, and staying all proceedings on the judgment until the decision of the general term on the appeal; and before the service of the order to amend upon the referee, he died:

Held, that the death of the referee was a misfortune the defendant must bear; and it followed that he must suffer all the consequences resulting from it. That the plaintiff was entitled to an order vacating the defendant's order to amend, &c., but the defendant was entitled to go on with his appeal from the judgment, and to have time to make a case and exceptions, with a stay.

Chenango Special Term, September, 1867.

MOTION by plaintiff to set aside or vacate an order made

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at a special term of this court in March, 1867, referring the case back to the referee, before whom the action was tried, to amend his report in a particular manner specified in the order or otherwise, as he might think correct, and staying all proceedings in the action on the part of the plaintiff until the referee should amend his report, and giving the defendant thirty days after service of a copy of the amended report, to make a case and exceptions, and staying all proceedings on the judgment entered in favor of the plaintiff on the report, until the decision at general term on appeal by defendant from the judgment.

The plaintiff in his notice of motion, asks for such other relief in the case as shall be just.

The action was brought upon a promissory note. The referee reported in favor of the plaintiff, that he was entitled to recover the principal and interest appearing to be due upon the note, viz : \$312.96, besides costs. The report was dated the 8th day of February, 1867. Soon thereafter, upon due notice to the defendant's attorney, judgment was entered upon the report of the referee, in the office of the clerk of Chenango county, in favor of the plaintiff, for said \$312.96 damages, with costs. The defendant immediately appealed from the judgment to the general term of this court, by giving the proper notices, &c.

It was after notice of the appeal had been served, that the order was made which the plaintiff moves to set aside or vacate, &c.

The referee died on or about the 5th day of April, 1867, and before the service upon him of the order requiring him to amend his report in the case. No steps have been taken in the action by either party since the death of the referee until the making of this motion by the plaintiff.

R. McDONALD, *for plaintiff.*

H. R. MYGATT, *for defendant.*

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BALCOM, J. The judgment in favor of the plaintiff was regularly entered on a report of the referee, which upon its face, is sufficient to uphold the judgment. The defendant appealed from the judgment to the general term of this court; and in preparing his case for the appeal, he deemed it expedient or necessary that the referee should amend his report, and find other facts not contained in it. He obtained an order that the referee amend his report in a particular manner specified, or otherwise, as he might think correct. Before this order was served upon the referee he died. The plaintiff now seeks relief from the order referring the case back to the referee, and staying his proceedings upon the judgment, &c.

The defendant's counsel insists that the case is in a similar situation that it would have been if the referee had died without making any report in it; and that it must be retried before another referee or a jury, as matter of course; and that the order referring the case back to the referee, to amend his report, having been regularly made at a special term of this court, it cannot be vacated or set aside at another special term of the same court.

These questions are new. No precedent has been cited to guide me in determining them.

The referee having completed his work so as to entitle the plaintiff to a judgment upon his report, his death was a misfortune to be borne by the defendant. And I am of the opinion the case is not to be retried as matter of course, in consequence of the order referring it back to the referee to amend his report.

I think the plaintiff should be permitted to collect his judgment, unless it be reversed on the defendant's appeal, or be set aside on his motion.

The obtaining of the order referring the case back to the referee to amend his report, was a proceeding for the sole benefit of the defendant, which did not affect the force or regularity of the judgment; and it only gave the defendant an opportu-

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nity to procure an amended report more favorable to his views, unless the referee thought otherwise.

The plaintiff does not seek to review the decision of the special term granting the order referring the case back to the referee to amend his report. He only asks to be relieved from the effect of that order, because the referee's death has rendered it impossible for the defendant to procure an amended report in the case. He could not obtain any such relief by appealing from the order. He must procure relief at a special term of the court, if the referee's death entitles him to it, for he cannot obtain it elsewhere.

The death of the referee being a misfortune the defendant must bear, it follows that he must suffer all the consequences resulting from it.

If these views are correct, the order referring the case back to the referee to amend his report, should be vacated. But the defendant is entitled to go on with his appeal from the judgment, and he should have time to make a case and exceptions, which may be settled by one of the justices of this court, on hearing the attorneys or counsel who tried the cause.

The order, so far as it stays the plaintiff's proceedings upon the judgment, should also be vacated. The Code provides that proceedings on judgments appealed from may be stayed by giving an undertaking, which I presume has been given in the case. But if none has been given that stays the plaintiff's proceedings on the judgment, and the defendant desires such a stay, or leave to give any undertaking, he may make a motion for that purpose.

I think no costs of this motion should be allowed either party.

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COURT OF APPEALS.

Wm. D. WHITE, appellant agt. EBENEZER A. LESTER, and others, respondents.

The provisions of the law of 1837, in reference to loaning certain moneys of the United States, &c., in reference to entering the *order* for the advertisement of sale, also entering a *copy* of the advertisement, and entering the places where, or the persons by whom the advertisements were put up, in the *minute-book* of the commissioners, are directory rather than compulsory, as against a *bona fide* purchaser, ignorant of such irregularity; notwithstanding the 33d section of such statute says: "All purchases made contrary to the provision of this section, shall be void." Such irregularities are not a violation of the 33d section.

There is no such disability in the *cashier* of a bank purchasing real estate at a public sale in his own name, but in fact for the benefit of the bank, as there is in the case of trustees with regard to the lands of their beneficiaries. Such a transaction in the former case would not avoid the sale, while in the latter it would.

Where both of the commissioners, under the statute of 1837, are present at and make the sale of the mortgaged premises, and the entry thereof in their book of minutes is made by only *one* of them, it is not a fatal irregularity. Besides, there is nothing in the law which requires this entry to be *signed* by the commissioners.

Where the plaintiff succeeds to the title of the mortgagor of the premises, and suffers the mortgage to become foreclosed by operation of law, by his delinquency in paying the amount due by the terms of the mortgage, it is equivalent to a foreclosure pronounced by a decree of a court, and nothing remains in the plaintiff but the special privilege of redemption. He has no right which can be prosecuted by action of ejectment against the purchaser in possession under the sale.

March, 1864.

ACTION of ejectment to recover the possession of certain lands in the village of Fredonia, in the county of Chautauque. The trial was had in that county before Justice DAVIS, without a jury, and resulted in a judgment for the defendants, which judgment was affirmed at a general term of the supreme court. From the latter judgment the plaintiff appealed to this court. The facts are sufficiently stated in the opinion of the court.

WILLIAM D. WHITE, *appellant, in person.*
CHAUNCEY TUCKER, *for the respondents.*

HOGEBOOM, J. The plaintiff sues in ejectment to recover

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from the defendants the possession of certain premises in Chautauque county. He claims title through John Z. Saxton, who was the admitted owner in 1837, and he showed a regular deduction of title from and through him, sufficient to maintain the action, unless it is defeated by facts to be hereafter noticed.

The defendants also claim through Saxton, who in August, 1837, executed to the commissioners for loaning certain moneys of the United States, a mortgage upon said premises, pursuant to the laws of 1837 (*chap. 150*), on which default was made in paying the interest due in October, 1842. On the 6th of December, 1842, an entry was made of this circumstance, and of the fact that the premises were advertised for sale for the first Tuesday of February, then next, in the commissioners' book of minutes, and in their annual report to the comptroller. The premises appear to have been duly advertised for sale by publication and posting, in the manner required by law, except that there was no *order* for the advertisement entered in the minute-book, nor copy of the advertisement entered therein, nor entry of the places where, or of the persons by whom the advertisements were put up; all of which was enjoined by the statute before referred to. The substance of the statute appears to have been observed in regard to the actual advertisement, and I am inclined to think the provisions as to the entries in the minute-book above referred to, were, notwithstanding the declaration of the statute (§ 33), that "all purchases made contrary to the provisions of this (33d) section shall be void," directory rather than compulsory, as against a *bona fide* purchaser, ignorant of the irregularity. These irregularities were not violations of the provisions of the 33d section. (*King agt. Stow, 6 Johns. Ch. 323.*)

On the 7th of February, 1843, up to which time the plaintiff appears to have been in possession, the premises were duly sold by both commissioners, and struck off to one Newland, who then, or within a few days thereafter, received a

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deed in due form from the commissioners, went into possession, and executed to the commissioners a new mortgage upon the premises. The defendants deduce a regular title through him. He paid his bill in cash to the commissioners, and the bid and subsequent transfer of title to the defendants was in his name, though he purchased in fact, as the case states, for the benefit of the Chautauque County Bank, but without any direction from the directors; by which I understand is meant that that institution was the purchaser, and intended to have the benefit (if any) of the purchase. I scarcely think this was a violation of the charter of the bank (*Laws of 1831, chap. 219*), as the purchase was purposely made in the name of Newland, and the title designed to be kept in him, although if the premises were subsequently sold at a profit, he meant that the bank, of which he was the cashier, should have the benefit of it. There was no disability in Newland to purchase, as there is in the case of trustees with regard to the lands of their beneficiaries, and, therefore, the purchase would not, I think, be void, but would inure to the benefit of Newland, if it could not be for the benefit of the bank. Such a transaction would not avoid the sale as against the plaintiff.

Although both commissioners were present at, and made the sale, the entry of it in the book of minutes was made by only one of the commissioners, and signed only by him, though purporting to be the act of both. This is claimed to be a fatal irregularity, under the case of *Olmstead agt. Elder* (1 *Seld.* 144). But no such point was presented in the latter case, and since the case of *Pell agt. Ulmar* (18 *N. Y.* 139), it must be regarded as overruled. Moreover, there is nothing in the law which requires this entry to be signed by the commissioners; and purporting, as it does, to be the *act of both*, we cannot presume against the truth of such a statement, simply because it is certified to be true by the signature of one commissioner.

There would appear, therefore, to be great doubt whether,

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if the case for the plaintiff rested upon the irregularity of the proceedings to foreclose the loan office mortgage, they were sufficiently defective to make them invalid. But I think an effectual answer to the plaintiff's claim consists in a fact now to be noticed. The plaintiff, who succeeded to the title of the mortgagor, suffered the mortgage to become foreclosed by operation of law, by his delinquency in paying the amount due by the terms of the mortgage. This was held in *Pell agt. Ulmar* (18 N. Y. 145), to be equivalent to a foreclosure pronounced by the decree of a court, and nothing remained in the plaintiff but special privilege of redemption. The plaintiff went out of possession, and the defendants (or Newland) took immediate possession, under a deed dated as of the day of the sale, and executed a few days afterwards.

It does not appear, it is true, as suggested by the plaintiff, that the commissioners took *actual* possession. They had no right to do so until after the day of sale, and then they did so in effect by putting their grantee in possession, who, or his successors, has occupied ever since.

If we assume that the alleged irregularities in the sale were sufficient to vitiate it as such, nevertheless the default in the payment of the interest, as was held in the case of *Pell agt. Ulmar*, from which this case cannot be distinguished, destroyed and foreclosed the plaintiff's title—destroyed even his common law equity of redemption, and left him nothing but a special right of redemption, to be enforced only by strict compliance with the provisions of the act of 1837. He had, therefore, no right which could be prosecuted by action of ejectment against the commissioners or their assignees. Newland took possession under the authority and consent of the commissioners, and having paid the amount of the mortgage, must be regarded, equitably, at all events, as a mortgagee in possession. If in possession under such a title he could not be dislodged by an action of ejectment, for such an action is forbidden by the Revised Statutes. (2 R. S. p. 312, § 37.)

But the case of *Pell agt. Ulmar* holds, that his rights are

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even less perfect than would be those of a mortgagor against a mortgagee in possession.

The plaintiff's counsel has attempted, but I think unsuccessfully, to distinguish this case from *Pell agt. Ulmar*. He is mistaken in supposing that Newland never took possession under his deed from Green and Douglas; and, I think also, in supposing that the deed was their *individual* deed. It *purported* to be on its face the deed of the commissioners, and such was the effect of the *acknowledgement*.

The judgment should be affirmed.

SELDEN, J., took no part in the decision.

All the other judges concurring.

Judgment affirmed.

SUPREME COURT.

FRIEND, BRISTOL, respondent agt. GEORGE M. CHAPMAN,
appellant.

The plaintiff is entitled to notice of the application by the defendant for the removal of an action from the state courts into the circuit court of the United States, under section 12 of the judiciary act of 1798.

Prior to the service of the notice of application, the defendant, it seems, must cause his appearance to be entered, and file his petition in the proper clerk's office, in the county named in the complaint as the place of trial.

Where the defendant, before service of notice of retainer, appeared in open court, at a special term held in another district, and after entering his appearance in the minutes of the court, presented his petition for the removal of the action into the circuit court of the United States, and obtained an *ex parte* order of the court for such removal:

Held, that the order was irregular and void, for want of authority to make it.

Onondaga General Term, June, 1867.

Before MORGAN, BACON, FOSTER and MULLIN, Justices.

*APPEAL from the order of the special term at Watertown, vacating an *ex parte* order of Justice BARNARD, granted by him at a special term in New York city, removing this cause into the circuit court of the United States.*

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Paine & New, for appellant.
Spriggs & McIncrow, for respondent.

By the court, MORGAN, J. The defendant, without having served a notice of retainer, walked into the court room in New York city, while Justice BARNARD was holding a special term, and without notice to the plaintiff's attorneys, caused his appearance to be entered in the minutes of the court, presented his petition for the removal of this action, under section 12 of the judiciary act of 1798, and obtained an *ex parte* order for such removal.

The place of trial is Oneida county ; and upon motion to the special term held in Jefferson county, the order of Justice BARNARD was vacated. The appeal is from the order vacating the original order of removal.

I have looked into the authorities, and without citing them, I think the order of Justice BARNARD was irregular, and cannot be sustained for the following reasons :

1. I think the plaintiff's attorneys were entitled to notice of the application.
2. I think the entry of the defendant's appearance was irregular. The appearance contemplated by the act of congress, is doubtless an appearance to be entered in the minutes of the court ; but the rules of this court have prescribed the manner in which the defendant's may appear, and what shall be deemed an appearance. This is by service of notice of retainer. On filing such notice, the defendant may, doubtless, enter his appearance in the proper clerk's office, and at the same time file his petition for the removal of the cause. Having filed his petition, he may then apply to the court at special term for an order of removal ; and, if necessary, obtain a stay of the plaintiff's proceedings until his application can be heard.

But whatever may be the correct practice in respect to entering the defendant's appearance, there is no difficulty in giving notice of the application at the same time the defend-

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ant enters and gives notice of his appearance. (*Redmond agt. Russell*, 12 Johns. R. 153; *Conkling's Treatise*, 3d ed. 479, note; *Disbrow agt. Driggs*, 8 Abb. 305, note.)

As notice was necessary in this case, the order of Justice BARNARD was not only irregular, but without authority; the place of trial being in Oneida county. (*Code of Procedure*, § 401, sub. 4.)

The order appealed from should be affirmed, with \$10 costs.
Order affirmed.

COURT OF APPEALS.

CASHTON R. GILBERT and others agt. WILLIAM GILBERT.

The provisions of the Revised Statutes (3 R. S. p. 15, § 51, &c.), must be construed as abolishing all trusts in land paid by one person, when the conveyance is given to another, whether for the benefit of the party paying the money, or for another, except where the conveyance is so taken without the knowledge or assent of the party whose money is so used, and excepting also the trust in favor of creditors. These provisions of the statute vest the title to the property in the alienee.

March, 1864.

APPEAL from judgment at general term.

INGRAHAM, J. Whether or not the money was paid by the father upon the condition that the title to the property was to be taken by the defendant in trust, to be conveyed to the plaintiffs after the death of the father, is by no means clear from the evidence. The defendant denies the agreement as positively as the witness Matthews, affirms it. The referee has found that such agreement was made, and the only question for us to decide is, whether such a trust by parol can be enforced. I understand the statute as applying to all trusts of that character, viz: Where the title is taken by one person, and the consideration is paid by another, whether the trust is intended to be for the benefit of the person paying the money, or of a third person. The 51st section (3 R. S.

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15) provides where a grant shall be made to one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made, but the title shall vest in the person named as the alienee in such conveyance; and the 52d section provides for the protection of creditors, where the fraudulent intent in taking such conveyance is not disapproved.

The effect of this statute, so far it relates to any interest in the person paying the money, was fully examined in this court by Comstock, J., in *Garfield agt. Hatmaker* (15 N. Y. 475), in which it was distinctly held that no estate, either legal or equitable, remained in the person paying the money; and that the creditor of such person could not, by a sale under a judgment and execution, obtain any interest or estate in the property so conveyed, but that there was only a pure trust in favor of a creditor, to be enforced only in equity.

In *Sieman agt. Austin* (33 Barb. 9), a different construction was put upon the 51st section, Emott, J., holding that it did not apply to cases where the trust was not for the benefit of the person paying the money. That case is now before this court for review, and it appears that the grantee voluntarily carried out the agreement by conveying the property to the person for whom it was intended. It was not necessary to the decision of that case to inquire whether there was any trust that could be enforced.

It is urged that this section does not apply to a case where the estate is taken for the benefit of a third person, other than the person paying the consideration money. There might be force in the suggestion, if the section only declared there should be no trust in favor of such person; but it goes further, and declares also that in such case the title shall vest in the person named as the alienee in the conveyance.

Had it been intended to exclude from the operation of this section, cases of trust for the benefit of third persons, there would have been no necessity for the 53d section, to protect the case of persons where the alienee, in violation of some

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trust, shall have purchased lands so conveyed with moneys belonging to another.

These provisions of the statute vest the title to the property in the alienee. They must be construed as abolishing all trusts in land paid for by one person, where the conveyance is given to another, whether for the benefit of the party paying the money, or for another, excepting where the conveyance is so taken without the knowledge or assent of the party whose money is so used, and excepting also the trust in favor of creditors.

I concur in the views expressed in the court below, and do not deem it necessary to add any thing further thereto.

Judgment affirmed.

COURT OF APPEALS.

HARVEY WARD, respondent agt. CORNELIUS VANDERBILT,
appellant.

Where in an action against a common carrier for damages by reason of negligence and fault in carrying the plaintiff for hire, where there is sufficient evidence to make it the duty of the jury to determine whether the plaintiff's sickness and loss of time were occasioned by the fault of the defendant, his agents or servants, the jury are authorized to allow him compensation therefor, although the plaintiff has given no evidence upon that point.

March, 1864.

APPEAL from judgment of general term.

BALCOM, J. The facts in this case are substantially like those in *Williams agt. Vanderbilt*, decided at this term of the court. The requests that the defendant's counsel made upon the judge, to charge the jury, do not make this case materially different from that brought by *Williams (supra)*. Those he first made were :

1. That the testimony did not establish that the defendant was a common carrier from New York to San Francisco.

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2. That the testimony did not establish any violation or neglect of duty on the part of the defendant.

3. That upon the whole evidence in the cause the plaintiff was not entitled to recover.

I am of the opinion the judge properly refused to charge either of these requests. There was sufficient evidence to make it his duty to submit the questions to the jury:

1. Whether the defendant was a common carrier of passengers from New York to San Francisco? (17 N. Y. 310.)

2. Whether he was guilty of neglect or violation of duty to the plaintiff?

3. Whether upon the whole evidence in the cause the plaintiff was entitled to recover?

The judge rightfully refused to charge the jury: that there was no evidence that the sickness of the plaintiff was occasioned by any fault of the defendant or his agents, and that the plaintiff was not entitled to recover damages for it. He also rightfully refused to charge them: that there was no evidence that the loss of time by the plaintiff was occasioned by the fault of defendant; that there was no evidence of the value of the plaintiff's time, and that the plaintiff was not entitled to recover for loss of time. The fact that there was no evidence of the value of the plaintiff's time, did not preclude the jury from giving him such compensation therefor as they deemed was reasonable. There was sufficient evidence to make it the duty of the jury to determine whether the plaintiff's sickness and loss of time were occasioned by the fault of the defendant, his agents or servants. And if the same were so occasioned, the plaintiff was certainly entitled to compensation therefor.

The other requests of the defendant's counsel were as follows, to wit: "The plaintiff is not entitled to recover his expenses incurred after receiving notice of the loss of the North America, and before commencing his journey home. The plaintiff is not entitled to recover the expenses of his return. If the jury find that the damages sustained by the

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plaintiff were occasioned by the loss of the *North America*, and that loss occurred before the plaintiff engaged his passage, but both plaintiff and defendant were ignorant of the loss, and dealt in good faith, then the dealing was based upon a mistake of fact, and the plaintiff is not entitled to recover in this action. Where a person engaged in the business of transportation, advertises or holds out to the public that he will carry passengers generally, between two ports or places, without disclosing the means of conveyance to be used for such carriage, he is bound, in case of the loss or destruction of the conveyance to which the passenger is assigned, to supply another conveyance, if one can be supplied by reasonable diligence. But where the carrier holds out to the public, and notifies the passenger applying for passage, that he will carry the passenger by a particular conveyance, which is described and designated, the undertaking of the carrier is restricted to that conveyance, and in case of the loss or destruction of that conveyance, without negligence, and by the act of God, the carrier is discharged from all liability, further than to return the passage money."

These requests were properly refused, for the reasons assigned in my opinion in *Williams agt. Vanderbilt (supra)*, and the authorities therein cited.

The judgment in this action should, therefore, be affirmed, with costs.

ROSEKRANS and MARVIN, JJ., expressed no opinion; all the other judges concurring.

Judgment affirmed.

Reynolds agt. Schultz.

N. Y. SUPERIOR COURT.

CHARLES M. REYNOLDS, respondent agt. JACKSON S. SCHULTZ
and others, appellants.

For any abuse by the *Board of Health* of the city of New York, of their authority, if they act *judicially*, as stated in the first subdivision, section 14, of the statute by which they were created (*Laws 1866, chap. 74, § 14*), such as, 1st. Making an order originally for the abatement of an alleged nuisance without evidence, or for refusing to revoke it, on overwhelming or uncontradicted evidence of its being erroneous, a writ of *certiorari* would afford a remedy.

2d. For refusing to fix a day for hearing of the party affected by the order a *mandamus* would lie; and,

3d. For the *usurpation of jurisdiction* in cases where not warranted by the statute, a *writ of prohibition* would furnish a corrective.

The authority and duties of the Board of Health under said first subdivision of the said fourteenth section, differ so widely from those created under the second of such subdivisions, as to justify the *constitutionality* of the former, even if the latter were defective.

This board are, by the statute, vested with the preliminary right of determining their *jurisdiction*, for the purpose of a hearing and final adjudication; and their decision upon such jurisdiction is final, if there is *any evidence* before them tending to sustain it.

Their provisional order granted under the statute, may become final by the failure of the parties interested and notified to demand a hearing. And whatever objection may be made in cases where no service of notice of the order is made, it will not apply in a case where the party is notified.

Abundant means are provided by the statute for obtaining the *sufficient proof* which the board are to take without leaving their office, or uttering a word themselves of accusation. Therefore, such a notice of accusation, or obtaining evidence in advance, with such opportunity of being heard with evidence, and such a notice of final determination, as the statute prescribes and furnishes, is an exercise of *judicial power*, and binding, unless prevented by some positive constitutional prohibition.

The following objections to the constitutionality of the exercise of power by the Board of Health, under the said first subdivision of section fourteen of the statute, that such proceedings violate "the law of the land," required to be observed by section 1, article 1, of the constitution of this state; and are not "due process of law," under the 6th section of the same article cannot be maintained, to wit:

1. That the functions of *accuser* and *judge*, are blended in the same body,
2. That no *process* is served, or notice of the proceedings given to the parties interested,
3. That the *judgment precedes the trial*;
4. That the accused is *not confronted with witnesses against him*;
5. That the *testimony is not under oath; nor the ordinary rules of evidence observed*; and,
6. That no means are afforded to the accused to *compel the attendance of witness*.

General Term, November, 1866.

Reynolds agt. Schultz.

Heard November 15, 1866. Decided January 16, 1867.

Before ROBERTSON, Ch. J., and GARVIN, Justice.

THE order appealed from in this case by the defendants, restrained them from enforcing an order made by them as "*The Metropolitan Board of Health,*" directing the suspension of the business of manufacturing shell lime, conducted by the plaintiff on certain premises in the city of New York, in East Fifteenth street (between avenues A and B), until the *mode of conducting such business should be so altered* as that no odors could escape into the open air; that *certain materials*, consisting of shells and other substances, *should be removed, and such premises cleaned.* The order so made by the defendants, was a modification of a prior order made by them directing absolutely *such business to be suspended, shells and other matters removed, and the premises thoroughly cleaned;* and directing that "*such premises and business were in a condition, and in effect, dangerous to life and health, and a nuisance.*" Such last mentioned order was so modified, after a service of a copy of it on the plaintiff, and his failure to demand a hearing within the time allowed by law for him to do so.

The order appealed from was made upon an order to show cause why a temporary restraint, which had been granted upon a complaint and accompanying affidavits, should not be continued. And the motion was heard on the papers on which such order to show cause was granted, and a sworn answer of the defendants, with accompanying affidavits.

The complaint sets forth the prosecution by the plaintiff of "*shell burning, or the manufacture of lime from shells,*" on the premises in question, and his payment of a large rent and taxes therefor. That the kilns in which he burned such shells were fifty feet distant from the street, and had been built twenty years previously, and have continually been used for that purpose. That the neighborhood has always been since he commenced such business, closely built upon and populous. That the health of the neighbors is good, and no sickness has resulted from carrying on such business.

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It then states the places from which the materials used by the plaintiff in his manufacture, are procured ; describes the process of applying the lime in the course of the manufacture to the consumption of animal matter, so that no perceptible smell or exhalation arises—and of heat so as to create an innocuous smell—and of water to the burned shells, so as to create a *disinfecting, inoffensive, agreeable and healthful vapor.*

It further alleges, that the product of such process is extensively used in building in the city ; is a powerful disinfectant, destroying or modifying animal matter when brought in contact with it, and not injurious to the health of persons residing in the vicinity of such kilns.

Such complaint also alleges, that one of the defendants, who is president of such board (Schultz), after reading a report in writing made by one of its inspectors, a physician of standing, and residing in the neighborhood of such kilns, favorable to the safety and healthfulness of the plaintiff's business and premises, declared his intention to compel the plaintiff to discontinue his business, and remove the shells he had accumulated ; and directed another inspector residing at a distance, and not familiar with such neighborhood, to examine the premises and make a report, who did so in writing ; and thereupon the defendants, as such board, made the first order, already alluded to, in which there is a recital that the board had "taken and filed among its records what it regarded as sufficient proof to authorize its declaration that the premises and business in question were a nuisance," and it therefore "entered them in its records as a nuisance." That application was thereupon made to the defendant Schultz, for a hearing before said board *upon such order*, their *opinion* thereon, and the general condition of the plaintiff's premises. That such Schultz in reply to such application, declared emphatically "that no evidence would satisfy him that shell burning was not a nuisance, and the business should be stopped at all events, and a hearing would be productive of no change in the order of the defendants." That about a month and a

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half afterwards, an officer of such board, by direction of the defendants, took charge of the plaintiff's premises, and compelled him to suspend his business.

The complaint further alleges, that many kilns at which large amounts of shells are converted into lime by the same process as that used by the plaintiff, exists in the city of New York. That the defendants made a somewhat similar order in regard to another similar but larger establishment, but that neither it nor other establishments, except the plaintiff's, have been placed in charge of an officer.

It further alleges, that the plaintiff has a large quantity of shells on such premises (60,000 bushels), procured at great expense, ready to be converted into lime. That he has a number of men (12) to whom he pays large wages, and a number of horses (7) in use in such business; is under large daily expenses, and manufactures a large quantity (600 bushels) of lime every day. That he has no means independent of such business, and if it is suspended he will be entirely ruined. That the cost of removing such shells would be enormous. That he has no means, and can procure none, to remove the same.

It denies that such premises, or the business carried on thereon, are a nuisance, or detrimental to life or health, and offers to establish that fact before any tribunal "acting according to the ordinary course of the law," in any way the court may require.

The relief demanded by such complaint was, for the restraint of the defendants, which was afterwards granted by the order appealed from, and for further or other relief.

The answer of the defendants denies the allegations in the complaint of the health of the neighbors of the plaintiff's establishment; of the absence of all sickness therefrom; its present and past cleanliness and good order. Also the allegations in it respecting the processes employed by the plaintiff; the effect of the lime; use of heat, and application of water to the materials, and their products at such manufactory.

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Also the statement in such complaint of the contents of the report of the first inspector, contained in it, of the declaration of the president of the board on its receipt, and any formal application for a hearing.

It further alleges the intention of the defendants to treat all lime kilns which they are satisfied is a nuisance, in the same way; and that as to the special establishment mentioned in the complaint, the only reason a similar order was not made, was the prior engagement of the defendants, and the lapse of time not being such as is required by law. It controverts the statements of the complaint, as to the extent of the plaintiff's business, except as to the quantity of oyster shells on hand, his means, the expense of removal, and its effect on the plaintiff, as alleged in the complaint.

Such answer claims that the defendants are the regularly constituted "Metropolitan Board of Health;" alleges that they took and filed among its records *what it regarded as sufficient proof* as to the premises and business in question, to authorize its declaration that the same was in a condition, and in effect, dangerous to life and health, and a public nuisance; and, thereupon, it entered on its records the same as a nuisance, and made the order before mentioned. That they caused such order to be served on the plaintiff before its execution, and the time fixed by law having elapsed without application for a hearing, or to have such order stayed or modified, by the plaintiff, or any person interested in such premises or business, upon proof of such service, no such hearing, stay or modification having been applied for, made a final order, whereby they modified such first order, directing "such business to be discontinued until the mode of conducting it be so altered that no odors could escape into the external air, and until the shells are removed, and the premises are thoroughly cleaned," and ordered it to be carried into execution.

Such answer also avers, that such premises and the business conducted therein, as it was carried on, were a nuisance, dangerous to life and health, and are in a condition, and in effect,

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so dangerous at the time of making such orders, and at the commencement of this action. It takes the objection that this court has no jurisdiction to restrain the proceedings of such board, or grant the relief demanded in the complaint.

The allegation in the complaint that an inspector of the defendants was requested by the defendants to make a report, and reported favorably on the plaintiff's establishment, is sustained by the affidavit of such inspector, but denied by the defendant Schultz, qualifiedly, upon belief. The allegation that such defendant on receipt of such report, peremptorily pronounced the business in question a nuisance, and declared his intention to have such business abated, is also sustained by the affidavit of the same inspector, but denied by that of the same defendant, except that he admits stating at some time that in his opinion, *shell burning, as conducted in lime kilns on the east side of the town, between Fourteenth and Fifteenth streets, was a nuisance in those localities, and as then conducted ought to be changed or abated, and that it was to correct such evils such board was established.*

The affidavit of the defendant Schultz, further denies any prejudice or predetermination on the part of the defendants against the plaintiff's premises or business; alleges that the opinion *which they formed, and upon which they acted, was derived from the evidence before them.* And that although it convinced them while present, *nothing prevented them from giving a fair and impartial consideration of any contradicting testimony produced.* That before any action was taken by such board, a petition had been presented by a large number of residents of the vicinity, complaining of the plaintiff's establishment as a nuisance, and begging its intervention. That the first order was made upon the written report of one of the inspectors of such board (Dr. Jones), and *other evidence, satisfactory to them.* That the board was always ready and willing to give the plaintiff "*a reasonable and fair opportunity to be heard before such board.*" That the plaintiff came to the office of the board with another person, when

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such defendant told him he was entitled to a hearing. Such other person then asked, what he thought the chances were on a hearing? And such defendant replied, he did not believe that the board would change its decision; that he for one had lived too long in the vicinity of the premises, and had experienced too often and too strongly, the bad odor proceeding from it, to be readily convinced that it was not a nuisance.

The report of the inspector, upon which the defendants acted in making the order in question, states the manufacturing of lime from shells, the presence of unburned shells with animal matter adhering thereto, the refuse and filthy condition of the premises were detrimental to health; that the burning of the shells caused a most foul and unhealthy odor, compelling the closing of doors and windows in the neighborhood.

The other affidavits were principally directed to the question of fact whether the plaintiff's establishment was or was not a nuisance. Other facts appear in the opinion of the court.

C. TRACY and G. BLISS, JR., for defendants, appellants.
J. C. CARTER, for plaintiff, respondent.

By the court, ROBERTSON, Ch. J. The circumstances of the present case do not call for such sympathy with the plaintiff, or indignation against the defendants, for unjust oppression of him by them, under cloak of legal authority, as to prevent a dispassionate examination of the legality or unconstitutionality of their acts as a board of health, under the recent statute creating them such. (*N. Y. Sess. L. 1866, chap. 74.*) Twenty-five persons residing in the immediate vicinity of the plaintiff's lime kilns, in addition to inspectors sent by the defendants for the purpose of examination, testify to the emission of fetid and deleterious odors from the materials out of which the plaintiff manufactured lime, during the course of their submission to great heat. Only nine neigh-

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bors testify to a failure to perceive any such odors, in addition to some experts, casual visitors, or passers by. The existence of fragments of decayed fish, bivalves, and other animal matter among such materials, is not denied. So that it would be difficult to believe that unless some powerful chemical agent were applied to them, they could be submitted to heat without the emission of a pestilential stench. The preponderance of the affirmative over the negative evidence, is, therefore, so great, that we would be compelled to hold on this appeal, that the plaintiff's business as conducted was a nuisance, if the question turned on that alone.

The defendants, moreover, do not appear to have exerted the authority conferred on them by the statute in question, in an arbitrary or more summary manner than it authorizes, provided they have constitutionally a right under it to prevent the plaintiff from conducting his business in the same way in which he had theretofore conducted it, require his materials to be removed, and his premises cleansed.

A formal complaint seems to have been presented to them of the character of the plaintiff's operations. The result of a personal investigation into the charge, by some of the officers of such board, who were medical men, and other evidence was presented to them, upon which they decided that the plaintiff's business and premises were a *nuisance*; and they thereupon made the order complained of. After personal service of such order, and the lapse of the time fixed by the statute after service of it for demanding a hearing, they made a final order modifying and meliorating the first.

No proper demand to fix a time for hearing the plaintiff upon the question of executing, modifying or rescinding such order, seems to have been made on his behalf. And it became absolute, except so far as it was modified. The existence of predetermined hostility, or disinclination to be governed by evidence at all, charged on one of the defendants, is not established; although the declaration of perhaps some preju-

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dice on his part against the business in question, as carried on, is admitted. No excuse is offered for not applying for a hearing, nor is there any pretense of any inability on the part of the plaintiff to procure all the evidence he might need on such hearing.

For any abuse by the defendants of their authority, if they act *judicially*, as stated in the first subdivision af section 14, of such statute, such as making the order originally without evidence, or perhaps for refusing to revoke it on overwhelming or uncontradicted evidence of its being erroneous, a writ of *certiorari* would afford a remedy.

For refusing to fix a day for hearing of the party affected, a *mandamus* would lie. And for the *usurpation of jurisdiction* in cases where not warranted by the statute, a writ of *prohibition* would furnish a corrective.

It will be presently seen that the decision of this case will not require any opinion to be expressed upon the constitutional powers of the legislature to delegate legislative authority to third persons, or to authorize them to destroy property, whenever in their opinion prejudicial to the community in any way, without hearing the owner of the property, or allowing him compensation for its destruction. Such questions arise more properly in the case of orders made under the second subdivision of the 14th section of this statute. An examination of the extent to which orders under that subdivision, can constitutionally be enforced, has been rendered unnecessary in this case, by the modification of the order as originally made by the defendants, by striking out all which required any removal of the plaintiff's materials for making lime from the premises in question. When that becomes necessary to be examined, it may be considered as a matter of grave doubt, whether the legislature can constitutionally authorize any person or body, either upon their private opinion or *ex parte* evidence, to destroy property, even under the pretext of the public good, without providing for a hearing before condemnation, or compensation. Even in the

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case of a conflagration raging, so as to threaten to destroy property not yet on fire, it has been decided necessary, in order to protect public officers authorized to blow up intermediate buildings to prevent its spread, from the burden of establishing its necessity, to provide compensation for the owners of the property destroyed. (2 R. L. 368.)

The only case relied upon in our courts to sustain the doctrine (*Van Wormer agt. The Mayor, &c. of Albany*, 15 Wend. 262, S. C.; *In Error*, 18 Wend. 168), will be found on a rigid examination of it not to sustain any such principle. From the nature of the pleadings in that case, as they appear in the report of it in the court of errors (*ubi supra*), as stated by the late chancellor (WALWORTH), as he clearly shows, the facts of *the buildings destroyed being a nuisance*, and the *necessity of the use of the means employed to abate it*, were admitted on the record. The only question of fact not admitted, and which formed the subject of the trial, was whether the defendants *destroyed such building by virtue of the ordinance under which they justified such destruction*. That able judge declined to express any opinion upon any other question in the case except those involved in the trial of that issue, but he noticed the fact, as did Ch. J. SAVAGE in the court below (15 Wend. 264), that the plaintiff *admitted the fact of the nuisance when heard before the board of health, and only objected to paying the expense of removing it*. Of course the mere absence of any subsequent question of the decision in that case, would not sanction the doctrine alluded to. Nor does the conferring of similar powers by various statutes on boards of health (1 R. L. 1801; R. & K. 373, § 32; 2 R. L. 1813, 54, § 25; 1 R. S. 441, § 3), argue anything in favor of their constitutionality, as they may have never been exercised except in cases of admitted nuisances, which any one is authorized to abate at common law. (3 Black. Com. 6.)

But the authority and duties of the defendants as a board of health, under the first subdivision of such 14th section of the statute creating them (N. Y. Sess. L. 1866, chap. 74),

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differ so widely from those created under the second of such subdivisions, as to justify the constitutionality of the former, even if the latter were defective. Such first subdivision authorizes such board to enter any business, pursuit, matter or thing, "of or belonging to any one, on their records as a nuisance, and order it specifically to be *abated or suspended, or otherwise improved or purified,*" but not until they have *taken and filed among their records, what they "shall regard as sufficient proof to authorise such declaration.*

It provides for a service of such order on parties interested in the business or thing declared a nuisance, and permits them to apply within three days afterwards, or at any time before the execution of such order, to the defendants or their president, for the modification or suspension of such order until a hearing, which they are bound to do (except in case of a pestilence raging), and give such applicant "*a reasonable and fair opportunity to be heard before them, and present facts and proofs against such declarations,*" and the execution of such order, or in favor of its modification. They are further required to enter *upon their minutes "the facts and proofs"* received by them, their proceedings upon such hearing, and any other proof "*they may take;*" and are thereupon empowered to "*rescind, modify or reaffirm such declaration or order, and require execution of the first, or any new or modified order to be made.*"

An amendment of such statute by another passed at the same session (*N. Y. Sess. L. 1866, chap. 686, §6*), gave the president, in the absence of the board, power to suspend or modify such order, or its execution, and permitted such board "*to change or modify any order made under such first subdivision, but not to increase its stringency, where no hearing was asked for by the party affected.*" Although no provision is made in such amendatory statute for serving notice of such modified order.

Such second subdivision authorizes such board to *order or cause any premises, ground, matter or thing, regarded by it*

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as in a condition dangerous or detrimental to life or health, to be "*purified, cleaned, disinfected, altered or improved,*" and any substance so alike dangerous or detrimental, to be removed to some proper place. It also provides for the service of such order upon one or more of the owners, occupants, lessees or tenants of the offending premises or subject, or upon one or more of those who were bound to do what such order required to be done. But such order, and service of it, is only required to be made to give the party served an opportunity to do personally what is required of him, so as to prevent its being done by such board at his expense.

No provision is made for any hearing of the parties affected by such order, or taking or preserving any evidence upon which the decision of such board, as to the danger or detriment of such premises or substance, is to be founded.

The right of such board, therefore, to cause premises to be cleaned, or offensive substances removed, rests entirely in the power of the legislature to give unlimited power to such a body to decide without hearing parties interested, and perhaps by inspection only, as to the necessity of purifying premises, or removing offensive matter, which I do not propose to discuss on this occasion, particularly as such powers do not involve the absolute destruction of property.

In regard however to the stoppage of a person's business, or the destruction of property under the first subdivision of such section (§ 14), the legislature have been more careful to place the exercise of such powers within the range of judicial functions.

The 31st section of the act in question, declaring all powers exercised by the board judicial, it is true, would not necessarily make them so, but if there be any room for doubt as to the mode of exercising such powers, or the interpretation of directions as to such mode, the language used in prescribing such mode is to be construed as requiring them to be exercised in a judicial, rather than an executive or ministerial manner; and such mode of exercising them is to be made if pos-

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sible, and consistent with any interpretation of the words to conform thereto.

Such board being bound by the 18th section of the statute to keep records of its acts and proceedings, is by the 14th bound to file among them the proof which it is authorized to take, justifying a declaration that the subject of examination is a nuisance, or detrimental to life or health, upon which it is to make a provisional order for its abatement, removal or melioration. They are thus vested with the preliminary right of determining their jurisdiction, for the purpose of a hearing and final adjudication, and their decision upon such jurisdiction is final, if there is any evidence before them tending to sustain it. (*People ex rel. Bodine agt. Goodwin*, 5 N. Y. R. 568.) Such provisional order may become final, by the failure of the parties interested, and notified to demand a hearing. And whatever objection may be made in cases where no service of notice of the order is made, it would not apply in this case, as the plaintiff was notified.

The statute requires the execution of the order to be suspended on demand of the party notified, and a hearing to be given him upon a *fair and reasonable* opportunity therefor, when he is to be allowed to give such proofs as he has to offer, and the board may also introduce new proofs. Upon such hearing they may modify or rescind such order in an action at law.

The board were then required to "cause the facts in regard to such complaint to be investigated, and the appropriate remedy applied." This resembles greatly the trial and decision of issues in an action.

If private individuals failed to call to their notice peccant employments, premises or substances, such board had a staff of accusers, consisting of ten medical inspectors, to report twice a week on such facts as had come to their knowledge, relative to the purposes of such act. So that abundant means were provided for obtaining the sufficient *proof* which the board were to take, without leaving their office, or uttering

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a word themselves of accusation. I cannot come to any other conclusion, than that such a notice of accusation, or obtaining evidence in advance, with such opportunity of being heard, with evidence, and such a notice of final determination, was an exercise of judicial power, and binding, unless prevented by some positive constitutional prohibition.

If the compulsory attendance of witnesses for the accused, if necessary, be required to make proceedings judicial, the board would probably be bound to give him the aid of the power they possess under the 24th section of the statute, to procure testimony. But in this case there is no pretense that any testimony has been lost by that means. If it had been set up properly, this court might have exercised an equitable jurisdiction in obtaining such testimony, and, perhaps, also thereby acquired jurisdiction over the whole subject.

In order to enable such board to obtain the *proof sufficient* for them to act upon, there was no necessity of their becoming active in hunting up testimony. The 21st section of such act required them to keep a book open for public inspection, in which complaints of a sanitary character were to be recorded, signed by the accuser with his name, in which was to be entered the name of the accused, the date, and the remedy suggested. This is not very unlike a complaint.

Possibly the decision upon the hearing, is not a subject of review upon *certiorari*. Although statutes sometimes give the courts to which such writ is returnable, that power. (*Niblo* agt. *Post*, 25 *Wend.* 280, 311; *Anderson* agt. *Prindle*, 23 *Id.* 616; *Morewood* agt. *Hollister*, 6 *N. Y. R.* 309; *People ex rel. Rhoades* agt. *Humphreys*, 24 *Barb.* 521.) Although even there they are bound, if there be some evidence before the inferior tribunal to justify their decision. (*Stryker* agt. *Bergen*, 15 *Wend.* 490.) The same rule is applicable to a review upon a like writ, of the evidence upon which the inferior tribunal has passed, in assuming jurisdiction. (*Ex parte Mayor of Albany*, 23 *Wend.* 277; *People ex rel. Bodine* agt. *Goodwin*, *ubi supra*; *People* agt. *City of Rochester*, 21

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Barb. 656.) There can be no pretense, therefore, that jurisdiction can be usurped by the defendants without redress, if they are mistaken in its exercise.

The main objections to the constitutionality of the exercise of power under such first subdivision, are that such proceedings violate "the law of the land," required to be observed by the first section of the first article of the constitution of this state, and are not "due process of law," under the sixth section of the same article. The special points in which they are supposed to deviate therefrom, are six in number, as follows:

1. That the functions of accuser and judge, are blended in the same body.
2. That no process is served, or notice of the proceedings given to parties interested.
3. That the judgment precedes the trial.
4. That the accused is not confronted with witnesses against him.
5. That the testimony is not under oath, nor the ordinary rules of evidence observed.
6. That no means are afforded to the accused to compel the attendance of witnesses.

The remarks already made dispose of the first and last of such objections. Indeed, I am not aware that there is any warrant for assuming that there must be a public prosecution except in cases in which the constitution requires the presentation of a grand jury, in order to make a conviction legal. Prosecuting officers are the creations of statutes, and however expedient, are not indispensably necessary to procure the punishment of offenders. The people of the state are the accusers.

The second and third of such objections are inapplicable to cases of an order made absolute, by the default of a party notified to move to or set aside after notice, or confirmed after a hearing, upon evidence upon both sides. Indeed, they are founded upon the mistaken notion that the first order is the

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final adjudication, instead of being either a conditional order and made absolute after a hearing, or neglect to appear after notice and demand such hearing.

The seizure of chattels in an action of claim and delivery, or the issuing of a preliminary injunction order, attachment or order of arrest, would be equally subject to such an objection.

As to being confronted with witnesses, if that applies to the hearing, the board are bound to allow it if their proceedings would otherwise be unconstitutional; and any irregularity in that respect could be corrected on *certiorari*. If oaths are necessary to be administered to witnesses, the same rule would prevail, although I am not prepared to say that an adjuration of a witness, whose form may be varied by law, and is allowed according to the conscience of the party sworn, including the simple affirmation of a member of the society of Friends, is a constitutional requisition to make a trial valid.

In regard to the attendance of witnesses, what I have already said as to that cause of complaint will suffice. And I am inclined to think that it will be found that a power to compel the attendance of witnesses for the accused, will not be found to be part of "the law of the land," mentioned in "*Magna Charta*," and was given in more recent times.

There still remains an objection to be considered, to wit: that no trial by jury is allowed under such statute. The words of the constitution upon that point are, article 1, section 2, that "the trial by jury *in all* cases, in which it has been heretofore used, shall remain inviolate forever." The term "case," in such provisions, has been held to mean the kind of action, prosecution or proceeding, and is not confined to the subject matter. Thus, in the case of *The People agt. Duffy* (6 Hill, 75), it was held, that a proceeding to compel a husband to support his wife, being a mere preventive proceeding, like giving security to keep the peace, did not require a trial by jury; and that preventive remedies for similar offenses having been used before the adoption of the consti-

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tution, obtaining them was not a "case," within the meaning of the constitution, in which trials by jury had been used. Although it was held that the adjudication of the magistrate on the subject of the marriage of the parties, although sufficient to compel giving security, was not conclusive.

But, although the judgment of the abatement of a nuisance at common law, "*quod permittat prostenare*," may have required a trial by jury, when demanded, yet courts of equity could always restrain the conducting of any business which was one, without such jury. And that is all which the order as finally modified in this case does. Such objection, therefore, falls to the ground.

These considerations render it unnecessary to pass on the question, whether if the powers of the defendants were constitutional, any irregularity in their exercise, and irreparable injury arising therefrom, required the interposition of the restraining power of this court.

The order appealed from must be reversed, and the injunction order discharged, with ten dollars costs of the motion at special term, but without costs on the appeal.

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SUPREME COURT.

HENRY J. KELLY agt. BEZABEL THAYER.

Where the parties stipulated that a motion noticed for a special term, might be heard before the judge at chambers, with the same effect as though heard at special term, and that upon filing his decision, an order might be entered in pursuance thereof, "as of the special term."

Held, that an order purporting to have been made by the judge "at chambers, as of special term," could not be supported as an order of the court, and an appeal from an order thus entered was dismissed.

Quere. Whether the decision of the judge at chambers, under such a stipulation, amounts to an *award*?

To give effect to the intention of the parties in such a case, the prevailing party should enter the order as an order of the special term, without reciting the stipulation, or noticing the fact that it was heard at chambers, instead of being heard at special term.

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It seems the court at special term would refuse to set aside an order thus entered, upon the ground that the party was *estopped* by his stipulation.

Where an order has been entered up by inadvertence, which plainly frustrated the object the parties had in view in entering into the stipulation, *it seems* the court at special term may set aside both the order and stipulation.

When a judgment creditor is not one of the petitioning creditors in insolvent proceedings, under article third of the insolvent debtor's act, the discharge does not subvert the judgment as a lien upon the insolvent's real estate, although it extinguishes it as a personal debt against the insolvent. (*Per MORGAN, J.*)

Onondaga General Term, April, 1865.

Before BACON, MORGAN, FOSTER and MUULLIN, Justices.

APPEAL from order of special term. The affidavits show that the plaintiff, a resident of Canada, on the 11th day of August, 1854, recovered a judgment in the courts of this state for \$270.07, against the defendant in an action on the case in trover; that said judgment was docketed the same day in Oswego county, and became a lien on certain real estate of the defendant in that county; that an execution was issued the next day, and duly returned *nulla bona*; and the reason stated is, that the said real estate on which the judgment was a lien, was so covered with prior liens, that nothing could be made; that the defendant was duly discharged, under the third article of the insolvent act, on the 15th day of October, 1856; that the said real estate, with other property, was assigned to trustees under said act, October 7, 1856, and they afterwards conveyed it to Richard Smith; and that Newall and Andrews are now in possession, under an executory contract of sale, claiming through Richard Smith.

The affidavits also state that David Goit, of Mexico, Oswego county, is the assignee of the judgment, but they do not agree as to the time he became such, whether before the application of the insolvent for a discharge, or afterwards; that on the 19th day of November, 1862, *all the prior judgment liens* being discharged by lapse of time, or otherwise, the attorney on behalf of David Goit, the assignee of the judgment, issued an execution to the sheriff of Oswego county, with instructions to him to sell said real estate to satisfy the judgment, but not any *afterwards* acquired by the

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defendant; that the sheriff sold the same, and the time for redemption expired April 13th, 1864, no one redeeming from the sale.

It is further stated, that the assignee of the insolvent sold the said real estate to Richard Smith, at public auction, for the sum of five dollars. This motion is made on behalf of the subsequent purchasers under Smith, to vacate the sheriff's sale and his certificate, and for a perpetual stay of execution upon the said judgment. The motion was first heard before Justice BACON, at chambers, under a stipulation that it should have the like effect as though heard at a special term, for which it was regularly noticed. The judge granted the motion, which was drawn up and entered, "at chambers as of special term."

The plaintiffs appealed to the general term, and the appeal was dismissed upon the ground that it appeared to be a chamber order.

Another motion was then made before Justice BACON, at special term, for leave to vacate, modify, correct or set aside the order made at chambers under the stipulation, and that the caption thereof be so amended, that an appeal may be taken from it to the general term as a special term order; or that a special term order might be made; or for other relief, as to the court should seem meet.

This motion was founded upon the original papers—the stipulation, the opinion of the court at general term, and an affidavit giving a history of all the prior proceedings upon the motion.

Upon this motion, the justice at special term thought it was right to amend the original order, or that a new order be entered, on which an appeal could be taken. An order was accordingly drawn up and entered at the special term, reaffirming the decision as contained in the first order, but containing a recital that the motion was by stipulation to be heard before Justice BACON, at chambers, with the same effect as though heard and decided at the special term for which it

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was originally noticed; and further reciting that the *motion was in fact made at chambers, in pursuance of the stipulation.*

GEORGE W. KENNEDY, for appellant.

CHAS. H. DOOLITTLE, for respondent.

By the court, MORGAN, J. It is objected that the order of the special term is erroneous, for the reason that the prior decision of the justice at chambers, was in effect an award, and superseded the original motion. As the papers now before us clearly show that the motion was referred by stipulation to a justice at chambers, and that the justice in fact heard the motion at chambers, it is very difficult to overcome the objection. I think it is shown very clearly in the opinion of Brother MULLIN, that the question upon the motion was the subject matter of an arbitration. Still the parties contemplated that a rule or judgment should be entered with the same effect as though the motion had been heard at a special term. It is impossible to give full effect to the stipulation, unless the prevailing party is at liberty to enter an order as of special term; which, as was said in the opinion of this court upon the first appeal, should be drawn up without anything appearing upon its face to show that it is not in fact what it purports to be.

The practice has been too long established, of hearing motions at chambers under stipulations of this character, to justify us in making any hasty decision, which would invalidate the proceedings, and disappoint the expectation of the parties. Nor can I see any impropriety in tolerating a practice which, by stipulation, allows the judge holding the special term, to hear motions at his chambers which are duly noticed for his special term. If an order is entered as though the motion was heard and decided at special term, an appeal may doubtless be taken to the general term, and the court at general term will not, I think, go behind the papers brought up on appeal, to inquire whether or not the decision was

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made by the judge at chambers, instead of being made by him at his special term. That question must go to the special term, and I think it is the established practice of that court to refuse to set aside the order, if the motion was fairly made and decided under the stipulation. I think I should hold the party to his stipulation, in all cases where no surprise or injustice could be shown as grounds for interference.

The respondent's counsel seems to have totally misunderstood or disregarded the intimations thrown out in the opinion of this court upon the former appeal, for he has literally loaded down his papers with a history of the stipulation and the proceedings under it; and finally, we are told that the justice at chambers heard the motion and decided it. All this knowledge should have been left out of the case, if he intended to have us decide the appeal upon its merits. The order made at special term seems to be unauthorized, for it merely attempts to affirm an order made by a single judge at his chambers; and it purports to be made upon the authority of the stipulation, whereas the stipulation refers the motion to the judge at chambers, which was the main difficulty in the case on the former appeal. As the papers now appear, there are plausible grounds for holding with Brother MULLIN, that the matter in dispute appears to have been taken out of court, and referred to arbitration. I am, however, inclined to the opinion that the parties may get rid of the embarrassment, by a motion to the court at special term to set aside the stipulation, and all proceedings under it, as having been unadvisedly taken in ignorance of the practice of the court in such cases, and resulting in depriving the parties of important rights, which it was one object of the stipulation to preserve.

It was my own impression that either party on filing the stipulation, might draw up and enter a special term order, embodying the decision of the judge at chambers, without any reference to its being heard at chambers; and if either of the parties had done this, even after the decision of the

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general term dismissing the former appeal, I do not now see how the other party could have avoided its effect, unless he had applied to the special term to set it aside; which application, I think, would have been denied. The only remedy for the defeated party would then be to appeal from the order of the special term refusing to set aside the order thus entered, in pursuance of the stipulation. And whether this court would interfere in such a case, it is unnecessary to decide, although it was pretty strongly intimated in the opinion of this court upon the former appeal, that the parties could be held to abide by an order which they had stipulated for in such a case.

Upon the merits, I am clearly of the opinion that the order cannot be sustained. The statute under which the defendant obtained his discharge, does not in any manner interfere with the prior liens of judgment creditors, except when they become petitioning creditors, and then they are required to add a declaration which operates as an assignment of the judgment to the insolvent's assignee's, for the benefit of all the creditors. (2 R. S. 36, § 11.)

It is apparent from this provision, that the judgment still continues a lien on the real estate of the insolvent, except when the judgment creditor is one of the petitioners. But if there was any doubt upon the language of this section, it is resolved by the subsequent provisions of the statute. The assignees or trustees, appointed under article third, take the real estate subject to judgment liens, and may redeem the same by satisfying the judgment, or they may sell subject to the judgment. (2 R. S. 42, § 7, sub. 7.)

It was decided in *Deyo agt. Van Valkenberg* (5 Hill, 242), that the discharge under article third, extinguished the judgment as a debt against the defendant, so that he could not afterwards be arrested upon a *ca. sa.* Although the judge in this case stated, in his opinion, that the discharge extinguished the judgment as effectually as if it had been paid or released, the case itself did not call for so sweeping a decla-

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ration. It was not the intention of the legislature to destroy or impair any liens previously obtained upon the property of the insolvent.

It has been held under a similar statute, that a debt secured by mortgage, was extinguished by an insolvent's discharge, so that no judgment could be obtained against the mortgagor upon any personal covenants to pay the mortgage debt; nor could the owner of the mortgage obtain a decree against the mortgagor for a deficiency after sale of the mortgaged premises. (*Loan Officers of Albany* agt. *Capron*, 17 J. R. 44.) Judge SPENCER, in delivering the opinion of the court, says: "The mortgagee may hold on to his lien, but if he resorts to the person, the debtor is absolved by the discharge."

The liens of judgments and mortgages are put upon the same footing by the statute under which the discharge was granted in the case at bar (2 R. S. 36, § 11); and the debt is not satisfied by the discharge, except as a personal demand against the insolvent. The judgment may still be enforced by execution against the real estate upon which it had become a lien, prior to the proceedings of the defendant to obtain his discharge. The discharge, when granted, will defeat a suit upon the judgment, but it will not destroy the lien. Whatever liens the judgment creditor has obtained before the insolvency is declared, are preserved by the statute, and may be paid off by the assignees or not, as the interests of the creditors shall require.

It is stated in the motion papers that prior liens existed to an amount sufficient to exhaust the real estate in controversy. If any of these liens were held by the petitioning creditors, and they have made the declaration required by statute to enable them to become petitioning creditors, then the assignees of the insolvent took the title of the lien holders for the benefit of all the creditors, and they could sell the property upon which the liens existed, and distribute the proceeds of sale equally among the creditors. And in case of a surplus, it

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would belong to the junior incumbrancer, who had not united in the petition of the insolvent.

But the papers before us do not show that the real estate in question was sold by the assignees to satisfy any prior liens surrendered to them by the petitioning creditors. I do not see any grounds, therefore, upon which this court can limit the right of the plaintiff to proceed at law to enforce the lien of his judgment as against the real estate in question. It was the privilege of the purchasers under the assignees to redeem. They only acquired the equity of redemption by the purchase of the land from the assignees of the insolvent.

Upon the facts so far as they are disclosed to us in the papers, I see no reason for interfering with the collection of the judgment as against the real estate of the insolvent, upon which it had become a lien long before the proceedings to obtain his discharge.

The order should, therefore, be reversed, upon either aspect of the case.

Justice MULLIN read an opinion in favor of reversing the order, upon the ground that the matter in dispute had been arbitrated under the stipulation of the parties, and the decree of Justice BACON, at chambers, had the effect of an award.

BACON and FOSTER, Justices, expressed the opinion that the parties might be *estopped* by their stipulation from taking that objection, if the order had been properly entered as of the special term; and they concurred with Justice MORGAN in the opinion that the order of the special term should be reversed, as it appeared upon its face to be founded upon the authority of the decision of the judge at chambers, under the stipulation, but without prejudice to a motion to the court at special term to set aside the stipulation and the proceedings under it.

Ordered accordingly.

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COURT OF APPEALS.

THE PEOPLE OF THE STATE OF NEW YORK agt. BENJAMIN
BRANDRETH and others.

Where an action is brought by the state against the *sureties of a bank* for the payment of moneys of the state deposited by a states prison inspector in the bank, the bank cannot set off a claim for moneys loaned the inspector, to be used for state purposes, where it appears that the inspector had no authority whatever, to borrow money upon the credit of the state.

January Term, 1867.

THIS was an action brought by *The People agt. Benjamin Brandreth and six others*, upon a bond dated May 28, 1860, by which they became securities that the bank of Sing Sing would repay all moneys deposited with it to the credit of the treasurer of the state.

The facts are fully stated in the opinion of the court.

J. H. MARTINDALE, *Attorney General, for respondent.*

L. TREMAIN, *for appellant.*

GROVER, J. The question principally argued by the counsel for the appellant, is not, I think, necessarily involved in the decision of this case. That question is, whether in actions brought by the people, counter-claims or set offs can be interposed by the defendant, the same as in actions prosecuted by individuals. Neither do I think it necessary to determine whether the defendants were at liberty to avail themselves of an indebtedness to the bank in this suit. The evidence offered and rejected upon the trial, did not tend to show any indebtedness thereof, legal or equitable, in a legal sense of the latter term, of the state to the bank. That offer was to show that the states prison, at Sing Sing, had borrowed money from the bank, and had expended the same in purchasing supplies and food, &c., for the prisoners. This was the counter-claim set up in the answer, and this the defendants offered to prove,

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and it was all they offered to prove. The case states that the evidence was rejected on the sole ground that in an action by the state to recover money, no counter-claim or set off can be allowed, to which ruling the defendant's counsel excepted. It is clear that error cannot be predicated upon the ground assigned for the ruling, or upon which it was made, when it appears clear that any different ruling upon the question would have been erroneous. In the present case, if the evidence offered and rejected in no possible view had a tendency to show any counter-claim by the bank against the state, its rejection was proper, and it was wholly immaterial to the defendants upon what ground it was based. This applies only to cases where it is impossible to obviate the difficulty on trial.

It only remains to show that the evidence offered had no tendency to show any counter-claim either at law or in equity in favor of the bank against the state. This appears from the total want of authority of the agent of the prison to borrow money on the credit of the state. It was not pretended that any such authority was conferred by any act of the legislature, even if that department of the government could confer such power upon him. (*See Const. § 8, art. 10.*) Nor did any other department of government pretend to give him any such authority. All that appears is, that the agent wanted money for the use of the prison, and the bank loaned it to him. He had no color of authority to borrow upon the credit of the state. If he had, every canal superintendent, indeed, nearly every administrative officer possesses the same power. If this be so, it is utterly impossible to preserve any control over the state finances. It is clear that the agent had no power to borrow the money. His so doing created no equitable or legal claim against the state, cognizable by the courts. The claim is entirely analogous to that of a party who should expend money to improve the real estate of a non-resident owner, without his knowledge or assent. He would have no claim to reimbursement that could be enforced

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at law or in equity. His only remedy would be to lay the facts before the owner, and be content with what he was willing to give. So in the present case, should the state consent to become sueable on claims by individuals, no action for this claim could be maintained by the bank. Its only remedy is an application to the legislature, and it must content itself with what that body may deem justice in the premises.

Meantime this debt of the bank to the state, for which these defendants have become sureties, should be promptly paid; and the judgment appealed from should be affirmed.

Concurring—BOCKES, SCRUGHAM, WRIGHT and DAVIES.

For reversal—HUNT and PORTER.

Affirmed.

HUNT, J., dissenting. This action was tried at the Westchester circuit, in September, 1864.

To maintain their action, the plaintiffs introduced in evidence a bond signed by all of the defendants, dated May, 28, 1860, and upon the condition "that the bank of Sing Sing shall well and truly pay, or cause to be paid, to the treasurer of the state of New York, all moneys deposited, or which hereafter may be deposited, to his credit as treasurer of the state of New York, in the bank of Sing Sing, by the agent and warden of the Sing Sing prison, upon presentation to the bank of Sing Sing of the drafts or checks of the said treasurer."

It was admitted by the defendants upon the trial, that between the 30th day of May, 1860, and the 18th day of September, 1860, there was deposited in the bank of Sing Sing, by the agent and warden of the Sing Sing prison, of the earnings of prisoners, \$59,753, and that of this sum there remained on deposit on the 3d of September, 1860, the sum of \$29,222.70; that upon that 3d day this sum was drawn for by a draft of the treasurer of the state of New York, for the sum of \$29,222.72; that the payment of said draft was refused, and the same was protested for non-payment. The

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excess of two cents in the draft on the deposit, was not noticed on the trial or on the argument, and is probably an error.

To sustain their defense, the defendants offered to prove the following facts:

First. That the state was and is indebted to the bank of Sing Sing in the sum of \$17,372.27, with interest from December 22, 1854.

Second. That the bank of Sing Sing is insolvent.

Third. That said indebtedness arose from moneys borrowed by the agent and warden of the Sing Sing prison, which were necessary, and were used for obtaining supplies of food for the inmates of said prison.

The plaintiffs' counsel objected to the evidence, and the court excluded it, solely on the ground that in an action by the state to recover money, no counter-claim or set off could be allowed, and directed a judgment for the plaintiffs. Upon appeal to the general term of the second district, the judgment was affirmed.

It is quite clear that the evidence offered by the defendants did not establish a technical set off. It failed in the indispensable qualification of not being a "demand due to the defendants in their own right." (2 R. S. 353, 366.) It was in form as asserted, a demand due to one not a party to the suit, to wit: the bank of Sing Sing. It failed as a counter-claim substantially for the same reason. It was not a demand "arising on a contract, and existing in favor of the defendants against the plaintiff." (Code, § 150.) Conceding these propositions, I am yet of the opinion that the court erred in excluding the evidence offered.

Viewing it as a question between individuals, the case before the court was simply this: The defendants were sureties that the Sing Sing bank would pay to the people, on draft, all the money that should be deposited to its credit by the warden of the prison. There was a balance due on such deposits of \$29,000. The bank, however, had advanced to

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the people, through the same warden, the sum of \$17,000; and if the bank had been the defendant in the present suit, instead of the sureties, no more than the difference between the two sums, to wit: \$12,000, could have been recovered. The sureties are claimed to be liable for their principal in the sum of \$29,000, while the principal himself is liable in the sum of \$17,000 only.

Every man's sense of equity revolts at this proposition. It is inequitable and unjust, that a surety, always regarded with favor, should be compelled to occupy a position of greater liability than his principal. In a court of law, where justice is administered by rigid rules, and forms sometimes endanger right, the defendants would be embarrassed by the existence of the propositions laid down by the court below, that this defense was not a set off, because it was not due to the defendants in their own right; and that it was not a counter-claim, because it was not a demand existing in favor of the defendants against the plaintiffs.

No such embarrassment, however, exists in a court of equity, whose powers are sufficiently extensive, always to apply a remedy where a clear injustice is discovered to exist. Independently of all statutes, courts of equity, in virtue of their general jurisdiction, grant relief in cases of mutual debts or credits. (*Story's Eq. Jur.* § 1435.) Thus where there is a legal debt upon one side, and an equitable debt upon the other, and where special circumstances exist requiring such interposition, a joint debt may be set off against a separate debt, or a separate debt against a joint one. (§§ 1436, 1437.) "So if one of the joint debtors is only a security for the other, he may in equity set off the separate debt due to his principal from the creditor, for in such case the joint debt is nothing more than a security for the separate debt of the principal; and upon equitable considerations, a creditor who has a joint security for a separate debt, cannot resort to that security, without allowing what he has received on the separate account, for which the other was security." (§ 1437;

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see also *ex parte Harrison*, 12 Ves. 345 ; *Ex parte Stephens*, 11 Ves. 24, facts.)

The bank is assumed by the proposition to have been insolvent, and if the defendants were compelled to pay this amount, the same could not be collected from the bank, though admitted to be a just debt. The defendants would be remediless.

The application of these principles relieves the case from technical difficulties, and entitles the defendants to make the proof offered. (See also *Gillispie agt. Torrance*, 25 N. Y. 306 ; *Code*, § 150, last clause, as to the form of the defense.)

Had the parties to this action been individuals, instead of the state—being plaintiffs, upon the doctrine established by these authorities, there would have been error in excluding the defense offered.

It is claimed, however, that when the state is the plaintiff, a different rule prevails, and that no demand can be set off against an established claim of the state, until it is audited by the proper accounting officers, pursuant to some statute. In their argument upon this point, the plaintiffs insist that a demand against the state is not a debt, in the sense that it can be set off, and that it is at the most a “mere claim upon legislative conscience and discretion.”

I cannot assent to this standard of estimating the obligation of a state or nation. The certain liquidated obligation of a state is governed by no lower rules, to say the least, than govern the obligations of individuals. It is in no sense a question of discretion nor of conscience, except of that good conscience, which requires the rigid performance of acknowledged duty. If payable at a day named, the state is then bound to meet its obligation, and if held by the citizens of a foreign country, its non-payment is just cause of war. A failure to pay, whether to its own citizens or to strangers, subjects it to a disgrace which can only be removed by a removal of the cause. Repudiation by a nation is the equivalent of fraudulent bankruptcy by an individual. It is true that a state cannot be sued, but this only makes more imper-

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ative the duty properly to meet all its pecuniary engagements. Honor, morality and duty, require it to perform its promises; and the fact that it cannot be arraigned in its own courts, can furnish no justification for its refusal.

Nor am I aware of any rule of law which requires the obligation of a state to be submitted to its own auditing officers before it becomes perfect. Should the state expressly enact to that effect, it would then become a question whether such enactment did not enter into the contract and form part of it. But as no such statute has been referred to, we are not called upon to examine that question. The offer here was to prove "an indebtedness to the state" in the sum named, and if an aduditing constituted an essential element of an indebtedness, proof of such auditing would be included in the offer made.

Although a state cannot be sued, I think it is subject to a set off, like individuals, when it comes into court as a plaintiff, and that both upon principle and authority. When it becomes a suitor, it waives for the time its dignity as a sovereign. It lays aside its strong arm, by which it can at once enforce its own claims, and submits itself to the arbitration of the court, and to its practice and its proceedings. For this purpose it is like an individual or an inferior corporation; and becoming voluntarily a party to a suit, no good reason can be given why it should not be bound by the same rules that are applicable to other parties in the same position. (*State of Illinois agt. Butterfield*, 8 *Paige*, 535; *United States agt. Arredondo*, 6 *Peters*, 711, 712; *The same agt. Bank of Metropolis*, 15 *Peters*, 377.) To the same effect is the statute (2 R. S. 553 m.), which enacts that where suits are brought in the name of the people, they "shall be subject to all the provisions of law respecting similar suits and proceedings, when instituted in the name of any citizen, except when provision is or shall be otherwise expressly made by statute; and in all such suits the people shall be liable to be nonsuited, and to have judgment of *non pros.* or discontinuance

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entered against them; in the same cases and in the like manner, and with the same effect, as in suits brought by citizens, except that no execution shall issue thereon." The state is subject to the same rules of pleading and of evidence, to the same practice, will submit to be dismissed from court where an individual would be, subjects itself to a liability for costs, and makes no reservation whatever, except in the single instance that execution shall not issue against it. The costs are directed to be paid the comptroller upon production of the payment of the judgment record, and the certificate of the attorney general. (*Id.*) I have no doubt that this statute does, and was intended to subject the state to a set off, where a set off would exist against an individual plaintiff.

The plaintiff seeks to sustain the judgment of the court below, upon the further ground that the prison warden had no right to contract any debt with the bank for the purpose mentioned, and that, therefore, the evidence was properly rejected. If the evidence had been admitted, it could have been readily ascertained whether there was an indebtedness against the state which would properly form the subject of a set off. We have no means of knowing what the evidence of the defendants could be. They offered to prove that "the state was indebted to the bank in the sum of \$17,377.27, as alleged in the answer," and the answer alleged in the indebtedness to have arisen from money furnished by the bank to the prison warden, for the purpose of the prison. They also offered to prove that "the same indebtedness arose from moneys borrowed by the agent of the prison, which were necessary, and was used for supplies of food for the inmates of the prison." If in any possible form, or under any conceivable circumstances, an indebtedness could have arisen from this advance of money, then the evidence of the defendants was improperly excluded. It will be observed that the offer does not state that the claim of indebtedness consists in or of the facts stated, but that it "arose" from these facts. If the legislature, upon a full statement of the facts, had directed

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the payment of the money through the comptroller or treasurer, and these officers had issued their draft or acceptance promising to pay it, I doubt not that this promise would have been an indebtedness to the state, and arising out of the transaction in the answer referred to, and would have constituted a valid set off. Possibly a much less formal recognition would have made it a debt against the state. The defendants are entitled to every possible assumption in favor of the evidence offered to be produced by them.

It is urged in this connection, that this defense was not available, because the bank was not a party, and would not be bound by any statement of its indebtedness thus to be made. To this, as well as to the entire objection of the want of power to create a debt, which we are discussing, it is a sufficient answer that no such objection was taken below.

The rule is, that no dilatory objection can be urged here which was not taken at the trial, and the present instance illustrates the wisdom of the rule. If it had been claimed in the court below, that the bank was a necessary party, the obvious remedy would have been an order that the cause stand over, for the purpose of making the bank a party. By now allowing an objection which the party omitted to interpose at the proper time, a valuable right of the defendants would be destroyed.

The plaintiff cannot, therefore, be permitted now to urge it.

The case states that the evidence was excluded "solely on the ground that in an action by the state no counter-claim or set off can be allowed." The party should be held to this proposition.

I am of the opinion that the court below erred in rejecting the evidence offered, and that a new trial should be ordered.

PORTER, J., concurred in the opinion of Judge HUNT.

Patteson agt. Baker.

SUPREME COURT.

JAMES A. PATTESON agt. ALFRED BAKER.

JAMES F. WINTER agt. SAME.

In an action in this state by a bill holder of a foreign banking corporation against a stockholder, in which it is sought to charge such stockholder upon a personal liability under the foreign statute, a complaint which merely alleges that "under and by virtue of a law or laws" of such foreign state, the defendant as such stockholder "is liable to the creditors" of the corporation, does not state a liability which can be enforced by an action, in this state.

If any personal liabilities of a stockholder of a foreign corporation, for the corporate debts, can be enforced in this state, it is such only as are primary and original liabilities of the stockholders as copartners, and the foreign law must be so averred, that it shall appear with certainty by the complaint itself, that as regards the debt sued on, the stockholders are in fact copartners, notwithstanding the charter, and that the liability under the statute is of this nature, and not a liability in the nature of a penalty, or a liability imposed after the contracting of the debt. (*Ex parte Von Ripper*, 20 Wend. 214, doubted.)

New York Special Term, October, 1867.

ACTION of money demand upon contract.

The complaint alleged the incorporation of a bank under a law of the state of Georgia, in 1830, the acceptance of the charter, the issuing of bank bills pursuant to the charter, the suspension of payment of its bills in 1861, and its continued suspension ever since that day; its solvency before January, 1861, and its total insolvency since that time; that the plaintiff, a citizen of New York, at various times since the first day of January, 1860, has become the lawful holder and owner, for value, and is now such lawful holder and owner of said bills, to the amount of \$60,000; that the defendant is a stockholder in the said bank, "and that under and by virtue of a law or laws of the said state of Georgia, the said defendant is liable to the creditors of the said bank as such stockholder, in the sum of double the amount of the stock so held by the defendant, or in some other proportionate sum; that the specific amount of the stock so held by the defendant is unknown to the plaintiff, but by interrogatories

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to be propounded, and otherwise, may be hereafter established and known, but that in such sum or amount, whatever it may be, the said defendant, by reason of his position as stockholder aforesaid, is liable to this plaintiff as a creditor of the said bank."

The defendant demurred, upon the grounds that the complaint did not state facts sufficient to constitute a cause of action; that the court had no jurisdiction of the subject of the action, and for defect of parties, in the omission as plaintiffs of all the other bill holders and creditors; and as defendants, of the corporation and all the other stockholders.

W. M. EVARTS, W. G. CHOATE and
JOHN FITCH, for defendants.
WINTER & HARRIS, for plaintiffs.

CLERKE, J. These, I believe, are the only actions on the October calendar, which are founded on an alleged contract arising under an act of the legislature of the state of Georgia, approved December 21st, 1830.

The main question presented by these cases is, whether this liability can be enforced within any other jurisdiction than that of Georgia.

If this liability is founded upon contract, in the ordinary legal sense of the term, it can without doubt be enforced here; for although laws have no force by their inherent vigor beyond the territorial limits of the state in which they are made, yet a contract which is valid where it is made, is to be held valid everywhere. But can the liability created by the act in question, be deemed a contract in the ordinary legal acceptation of the word?

The complaint alleges that "the defendant is a stockholder in the said Mechanics' Bank, and that under and by virtue of a law or laws of the said state of Georgia, the said defendant is liable," without averring that such a law was in force at the time the debt was contracted, and without showing that

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the liability was founded on a contract, and not on a special provision in the nature of a penalty.

This allegation is not sufficient to enable us to assume that an original liability existed by the terms of the charter, as in unincorporated associations and copartnerships, or that it devolved in consequence of some general law. The allegation is obnoxious to that rule of pleading which holds that when different meanings present themselves, that construction shall be adopted which is most unfavorable to the party pleading.

Charters of incorporation generally exempt the stockholders from individual liability, or rather, they do not generally impose individual liability, and when stockholders were made liable, the liability is created by a special provision, often in the nature of a penalty. In such case, in addition to the ordinary loss which every stockholder suffers by the failure of the company, this liability is imposed upon him not by any general law, not by the common law, but by such special provision.

I therefore conclude from the terms of the allegation, that the defendants did not originate as a debt like that incurred by a member of a copartnership, which is due primarily by him, as well as by the other members, but that it was created solely by a statute of the state of Georgia, imposing a liability in the nature of a penalty, passed, for all that I can learn from the complaint, after the act of incorporation, or even after the contraction of the debt.

In this state, I am aware that liabilities imposed on stockholders by the act of incorporation, or by a general statute, have been regarded by our courts in the nature of contracts, but it does not follow that liabilities created by the legislature of another state, would be enforced here. The question is not whether they are technically regarded as contracts; but even admitting that the nature of the liability in certain cases is equivalent to that of a contract, is it such a liability that the courts of this state will invariably enforce?

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In *ex parte Von Riper* (20 Wend. 614), the liability of a director of a New Jersey bank was recognized. The charter provided that the president and directors shall be, and continue, liable individually for the payment of any bills which they may issue or circulate. This was making them primarily liable as if they were copartners, and continued unincorporated.

In *Perkins agt. Church* (31 Barb. 84), it appeared that by the general laws of Wisconsin, stockholders in every corporation organized under the provisions of the banking act, are individually responsible for its debts.

The liabilities in both these cases can scarcely be called special. In the first, the statute providing that the president and directors should continue liable as partners; and in the second, stockholders without exception, are made liable by a general law. In the latter, however, the objection which we are now considering, was not taken. Both cases were decided at a special term.

On the whole, I am of opinion that these actions should not be entertained by the courts of this state, and being of this opinion, it is not necessary to consider the other questions raised by the demurrer.

Judgment for the defendants on the demurrer, with costs, with leave to plaintiffs to amend within twenty days, on payment of the costs of demurrer.

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SUPREME COURT.

JAMES F. WINTER agt. ALFRED BAKER.

AND FOUR OTHER CAUSES AGAINST SAME DEFENDANT.

A creditor of a foreign corporation cannot maintain an action in this state against a director of the corporation for willful and fraudulent mismanagement of its affairs, whereby the property of the corporation was wholly wasted, lost or embezzled,

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and the corporation rendered wholly insolvent, and the plaintiffs' claims against the corporation rendered wholly worthless. (*Affirming Gardner agt. Pollard*, 10 *Brow.* 674; *Smith agt. Poor*, 40 *Maine*, 415; *Smith agt. Hurd*, 12 *Mel.* 371; *Allen agt. Curtis*, 26 *Conn.* 460.)

New York Special Term, November, 1867.

ACTION for damages. The complainant alleged that he was the holder and owner for value, of a large amount of bank bills issued by a banking corporation of the state of Georgia; that the defendant was a director in said bank ever since January 1, 1857; that prior to January 1, 1861, the bank was solvent and able to pay all its debts; that after July 1, 1861, the bank became, and has ever since been insolvent and unable to pay its debts; that this insolvency was caused by various acts of malfeasance and misfeasance of the defendant and the other directors; among said acts being the following:

1. Selling the valuable assets of the bank for bills, notes and bonds of the Confederate States.
2. Receiving deposits of confederate money, and repaying them with good and valid assets of the bank.
3. Making unlawful agreements on behalf of the bank with third parties, and settling them with the valuable assets of the bank.
4. Selling the assets at credit in banks of New York, London and elsewhere, for confederate money and bonds.
5. Exchanging the bills of the bank for confederate money.
6. Disposing of the gold and other assets, without getting value therefor.
7. Using the funds of the bank in speculation, for defendant's own gain and profit.
8. Selling cotton and other assets of the bank to the defendant himself, and other directors, without securing value therefor.
9. Paying dividends to stockholders, including defendant, after the bank had suspended.
10. Loaning to the defendant himself, assets of the bank, which were repaid and settled in depreciated currency.

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The defendant demurred to the complaint, upon the grounds that the complaint did not state facts sufficient to constitute a cause of action; that the court had no jurisdiction of the subject of the action, and for defect of parties.

**W. M. EVARTS, W. G. CHOATE and
JOHN FITCH, for defendant.
WINTER & HARRIS, for plaintiff.**

CLERKE, J. These are actions brought by the several plaintiffs as the holders of the bills of a bank incorporated by the state of Georgia, against the defendant as a director of the corporation.

The reasons which I have mentioned in the preceding cases apply to these with greater force. But more especially applicable to these cases is the rule well established, that a stockholder cannot sue directors for damages, on the ground their stock was made valueless by the misconduct of the defendant. If a stockholder cannot maintain such an action, a creditor certainly cannot do so.

Judgment on the demurrers, with costs.

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SUPREME COURT.

ISAAC SCOTT agt. WILLIAM S. ROBERTS.

AND FOUR OTHER CAUEES AGAINST SAME DEFENDANT.

An action will not lie in this state by an individual billholder against an individual stockholder, to enforce the personal liability of a stockholder of a foreign banking corporation, by whose charter it is provided that the persons and property of the stockholders in said bank should be pledged and bound in proportion to the amount of the shares that each individual might hold in said bank, for the ultimate redemption of the bills or notes issued by or from said bank, during the time he may hold such stock, as in commercial cases, or simple cases of debt.

New York Special Term, November, 1867.

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THE complaint alleged the incorporation of a bank by the state of Georgia, in 1830; the issue of bills from 1831 to 1863, to the amount of \$1,500,000, which the plaintiff holds to the amount of \$100,000; that payment had been demanded and refused; that at the time of issuing the bills, the bank had a capital of \$500,000 in gold and silver coin, and other property; that the defendant some time before 1854, was elected a director, and continued to act as such till January 4, 1866, and was during the same time a stockholder; that during the years 1862-1865, the defendant, with the other directors, sold the property of the bank, and with the proceeds purchased confederate notes and bonds, and also speculated in cotton with the proceeds, making large profits, which the defendant and the other directors divided among them, giving the bank for all its property only confederate notes and bonds, which were wholly worthless; that thereby the bank was made insolvent, and deprived of all means of paying its bills; that the bank made an assignment January 4, 1866, and ceased all business, and has no officers or place of business, or property of any kind, and that the assignee has no assets; that by the charter it was enacted that the persons and property of the stockholders in said bank should be pledged and bound in proportion to the amount of the shares that each individual might hold in said bank, for the ultimate redemption of the bills or notes issued by or from said bank during the time he may hold such stock, as in commercial cases, or simple cases of debt; that the whole number of shares in the capital stock was 5,000, of the par value of \$100 each, of which the defendant during the time aforesaid, was, and now is, the holder of 119 shares; that the whole circulation was \$1,500,000, and that the proportion of the defendant's stock to the capital was 1-42. Wherefore, the plaintiff demanded judgment for \$100,000.

The defendant demurred for want of jurisdiction of the subject of the action; for defect of parties in the omission of

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the corporation and the other creditors, stockholders and directors.

**W. M. EVARTS, W. G. CHOATE and
JOHN FITCH, for defendant.
WARD & WHIEHEAD, for plaintiff.**

CLERKE, J. These are actions brought by the several plaintiffs as the holders of the bills of a bank, incorporated by the state of Georgia, against the defendant, as a director of the corporation.

The reasons which I have mentioned in the preceding cases, apply to these with greater force. But more especially applicable to these cases is the rule well established, that a stockholder cannot sue directors for damages on the ground their stock was made valueless by the misconduct of the defendants.

If a stockholder cannot maintain such an action, a creditor certainly cannot do so.

Judgment on the demurrsers, with costs.

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NEW YORK COMMON PLEAS.

WILLIAM M. GARRISON agt. WILLIAM H CARR.

Where a *summons* is issued under the first subdivision of section 129 of the Code, demanding judgment for a sum certain ; and the complaint states a cause of action arising upon contract, to recover unliquidated damages for the breach of a contract in the construction of a piece of machinery, the summons must control ; and the complaint is irregular.

Where, in such case, the defendant, after service of the complaint, obtains an extension of time to answer, he waives the irregularity in the complaint.

Special Term, October, 1867.

MOTION on behalf of defendant before answer, to set aside the complaint "as inconsistent with the summons."

Garrison agt. Carr.

The summons is in form "for a money demand on contract," and asks judgment for a sum specified therein. The plaintiff by his complaint, claims to recover damages for the breach of a contract entered into by defendant with him for the construction of a piece of machinery, which, as is alleged, was not completed by the defendant within the time fixed in the contract. The damages claimed are not liquidated by the contract.

N. TUGWELL, JR., *counsel for defendant, for motion.*

D. THORNTON, *counsel for plaintiff, opposed*

VAN VORST, J. The summons in this action is under the first subdivision of section 129 of the Code, and demands judgment for a sum certain. The complaint, it is true, discloses a cause of action "arising on contract," but not "for the recovery of money only." The amount sought to be recovered is not fixed or liquidated by the terms of the instrument. They are yet to be ascertained, and will require proof outside of the contract to establish them.

The summons must control, and as it indicates an action arising on contract for the recovery of money only, the complaint to be regular should correspond with it.

But I think that the defendant must be held to have accepted the complaint as it is, and to have waived the objection of its non-conformity to the summons. He has obtained an extension of time to answer, and this is an admission that the complaint was to be answered. (*Bowman agt. Sheldon, 5 Sandf. 662.*)

It is too late for him to raise the objection now. He should have moved promptly if he meant to have insisted on this irregularity, and not have sought the favor of an extension of time to answer, and use it for the purpose of this motion.

Motion denied, but without costs.

People agt. Ferris.

COURT OF APPEALS.

THE PEOPLE *ex rel.* GILBERT K. ROBERTSON appellant agt.
BENJAMIN FERRIS and others, respondents.

On *certiorari* to review the decision of referees in laying out a highway, the authority of the supreme court is confined to an *affirmance* or *reversal* of their proceedings and decision.

Where the supreme court on such review made an order vacating the decision of the referees, and that the "order appointing them be set aside, the appeal to stand, to be determined by a new board of referees, to be appointed by the county judge :" *Held*, that the court exceeded its authority. The latter part of the order granted was void.

It is the practice of courts of review, to reverse judgments and orders granted *without jurisdiction*.

January Term, 1867.

THIS is an appeal from an order of the general term of the supreme court in the fourth district, made in a case brought before the court by common law *certiorari*.

Proceedings were taken under the statute to lay out a public highway through the enclosed lands of the relator, Gilbert Robertson, and one Stephen Timmerman, in the town of Argyle, Washington county, which resulted in an order by the commissioners of highways of the town laying out the proposed road.

An appeal from this order was taken as provided by law, whereupon the county judge appointed three referees to hear and determine the appeal. The referees having notified the parties entitled to notice, proceeded in the execution of their duties, and finally (January 26th, 1858) made an order concurred in and signed by two of their number, by which they affirmed the order of the commissioners laying out the road. The relator sued out a common law *certiorari*, directed to the referees, to which they made return of their proceedings, and on which return the case was heard and decided by the supreme court. That court made an order as follows : "Decision of the referees vacated ; *order appointing them set*

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aside, the appeal to stand, to be determined by a new board of referees, to be appointed by the county judge."

G. ROBERTSON, *for appellant.*

JAMES I. COON, *for respondents.*

BOCKES, J. The case is here on an appeal from the latter portion of the order above italicised. It will be observed that the part of the order vacating the decision of the referees is not appealed from, and of course is not under review. That was equivalent to a reversal by the supreme court, of the proceedings and order of the referees, and to that extent the order stands unchallenged before this court. The propriety or validity of the remaining portion of the order is the subject of the present examination.

The *certiorari* was directed to the referees, and brought up for review only the proceedings and determination of those officers ; and the only duty devolving on the supreme court was to affirm or reverse their proceedings and decision. This was the extent of the authority resting in that court. (10 *Wend.* 167 ; 3 *Hill*, 426 ; 5 *Id.* 413 ; 7 *Id.* 577.) It did not bring up the proceedings prior to their appointment, or present any question in regard to the regularity or correctness of the order appointing them ; and it must necessarily follow that it was erroneous in that court to set aside such order and prescribe future action in the case. As above suggested, the authority of the supreme court was limited to a reversal or affirmation of the order and proceedings of the referees.

It is urged that the part of the order appealed from, if without authority, was simply void ; and that no appeal from such part could, therefore, be taken to this court. On the argument, it was stated and conceded that a motion had been made to dismiss the appeal on this and other grounds, and that the motion was denied.

Such decision must conclude the parties as regards that question. Besides, it has been the constant practice of courts

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of review to reverse judgments and orders granted without jurisdiction.

This is often the only way in which the records of the courts can be purged of errors and dangerous precedents.

In this case, the error complained of doubtless occurred through the merest inadvertence, and could and would have been corrected by the supreme court, on motion, or even suggestion, and that would have obviated this appeal. I am, therefore, directed to say as the opinion of the court, that the reversal of the part of the order appealed from, should be without costs of appeal.

The part of the order appealed from reversed, without costs.

All the judges concurred in the above opinion.

NEW YORK COMMON PLEAS.

JOHANNA SANDROCK agt. EDWARD KNOP.

Where a person is arrested upon a criminal warrant and brought before a police justice, and thereupon enters into a recognizance to appear at the court of *general sessions* to answer the charge, the police justice is thereby deprived of all further jurisdiction in the case. If he subsequently proceeds in the case and discharges the defendant for want of probable cause, or for any other cause, his proceedings are without authority, and a *nullity*.

Special Term, December, 1867.

THE plaintiff commenced an action against the defendant for false imprisonment, alleging that she was arrested, brought before the magistrate and imprisoned, without any cause for same. An order of arrest was made in this action, under which the defendant was taken, and is now held in custody.

Defendant moves for an order vacating the order of arrest.

CHARLES S. SPENCER, *for motion.*

CHARLES FRASER, *opposed.*

Sandrock agt. Knop.

VAN VORST, J. This action is brought by plaintiff to recover damages for an alleged false imprisonment, made, as claimed, without "probable cause." The complaint upon which plaintiff was imprisoned, was made before a police justice of the city of New York, by the defendant, charging plaintiff with having been engaged in a conspiracy with one Levy, to cheat and defraud defendant.

The plaintiff was arrested and brought before the police justice who issued the warrant, on the 25th day of October, 1867, and entered into a recognizance, with one Goldsmith as surety, in the sum of \$2,000, for the appearance of the plaintiff at the court of general sessions of the city and county of New York, to answer the said charge.

It appears that subsequently, and on the 23d of November, the justice proceeded to examine the case, and discharged the complaint, and ordered the bond to be cancelled. The entering into the recognizance on the part of the plaintiff before the justice, had the effect to divest him of authority further to examine into this complaint. The proceedings thereafter in the investigation of the alleged offense, was to be had at the general sessions, and before the grand jury.

The examination before the justice, and the cancelling of the bond on the 23d of November, were of no effect, and have no binding force.

It cannot be affirmed that there was no "probable cause" for the arrest and imprisonment of the plaintiff, as the criminal proceedings against her are still pending. Nor can I dispose of that question upon affidavits, as the matter is before a competent tribunal for investigation.

Motion to vacate order of arrest granted.

People agt. The Pacific Mail Steamship Company.

SUPREME COURT.

THE PEOPLE *ex rel.* CHARLES A. RICHMOND agt. THE PACIFIC MAIL STEAMSHIP COMPANY, and others.

A stockholder in an incorporated company, cannot be deprived of the right to inspect the books of the company, because they are kept in a particular way, or because they contain along with the information to which he is entitled, other information which he has no right to demand.

If a corporation does not keep the books which the statutes prescribe, it is its duty to permit an inspection of such as it does keep for the purpose of recording the transactions which the statutes give the stockholders the right to know. And such inspection may be enforced by *mandamus*.

Brooklyn Special Term, November, 1867.

THE relator, a stockholder of this corporation, having applied for an inspection of the transfer books, and the book or books of the company containing the names of the stockholders, was offered the transfer books and two books containing registers of certificates of stock extending back to 1864. The corporation has no stock list, nor do they keep the book which the thirteenth section of their charter hereafter noticed, requires them to keep.

The relator states, that to ascertain who hold stock in the company, and the number of shares, would require an examination of every entry in the books offered, and in any book of the same description, going back to the organization of the company in 1848, and that he afterwards demanded an inspection of the stock ledger, which was refused

He then states what a stock ledger is, and shows that an inspection of it would give him the information sought.

AARON J. VANDERPOEL and
JAMES EMOTT, *for stockholders.*

CLARKSON N. POTTER, WM. M. EVARTS and
CHARLES O'CONOR, *for the company.*

GILBERT, J. The company do not deny that an inspection

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of the stock ledger would give the relator the information which he has a right to have, but they justify their refusal to exhibit it on the ground that it is a book of accounts between the company and its shareholders, and shows their dealings in the stock of the company; that it is always regarded as confidential between the parties concerned, and that the information it contains might be used for improper purposes.

A case is not made, which under the rules of the common law, entitles the relator to a *mandamus*. (*Taylor's Ev.* § 1102; *Grant on Cor.* 311.) His right to the remedy sought, depends on the construction to be given to the thirteenth section of the company's charter, and the first section of title 4, chapter 18, part 1, of the Revised Statutes. (1 R. S. 601, §1.) The charter provides as follows:

"Section 13. It shall be the duty of the said corporation to cause a book to be kept by the treasurer or clerk thereof, containing the names of all persons who are, or shall, within two years, have been stockholders in said corporation, and showing their places of residence, the number of shares of stock held by them respectively, and the time when they respectively became the owners of such shares; which book shall at all reasonable times be open for the inspection of the creditors and stockholders of the said corporation, at the office or principal place of business of said corporation."

The charter also confers the usual power to make by-laws. The 18th by-law provides that in ascertaining the number of votes on which each stockholder is entitled to vote at the election of directors, the inspectors shall be governed by the number of shares standing in his name, as shown by the stock ledger after the closing of the transfer books preparatory to such election. By the Revised Statutes, "the book or books of any incorporated company in this state, in which the transfer of any stock in any such company shall be registered, and the books containing the names of the stockhold-

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ers in any such company, shall be open to examination by any such stockholder."

This latter enactment was first made in the memorable act to prevent fraudulent bankruptcies of corporations, passed in 1825. The provision of the charter is in aid of the objects of this statute, and in the determination of this question both are to be taken together. Being remedial acts, and also beneficial to the public, they should be equitably construed, so as to promote and not impede or frustrate the objects intended. (*Cotheal agt. Browner*, 1 *Seld.* 565; *Reviser's notes*, 5 *Edm. Stat.* 280.)

The question then is, whether the stock ledger is embraced within the designation of the books which the statutes cited give the relator a right to inspect or examine. If it is, I think the duty of enforcing the right by *mandamus* exists, and under the circumstances of this case, is the appropriate and only remedy. (*People agt. Throop*, 12 *Wend.* 185.)

Turning then first to the Revised Statutes, I think it clear that a right of inspection generally is not given, but that it is restricted to the register of transfers and the list of stockholders; or if such books are not formally kept, to such books as the company do keep, for the purpose of showing the original ownership of the stock, and the changes which shall have occurred from time to time in such ownership. The book prescribed by the charter is such a book. It is a register of transfers and a stock list combined. The stock ledger, although not exactly the book prescribed by the charter, will serve all the purposes of that book. The books offered do not answer this purpose. They contain the original transactions merely; whereas the statutes give a right to inspect the accounts, or registration of them. The stock ledger is such an account or register, although it contains more than the legislature intended. It is the only book kept by the company, an inspection of which would secure the objects of the statutes. The charter provides for the obtaining of the requisite information in the summary and conveni-

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ent mode which the book would afford. The company cannot be permitted to defeat these objects, by omitting to keep the book prescribed. The statutes do not point out the mode in which the books shall be kept, but describe them by a reference to the contents of them. A stockholder cannot be deprived of the right to inspect them because they are kept in a particular way, or because they contain along with the information to which he is entitled, other information which he has no right to demand.

These statutes were passed for the benefit of the stockholders, and for the government of the company. The right of inspection is a substantial one; the object of it being to aid the stockholder in promoting the interests of the company and his own, by the choice of directors.

Although the legislature did not intend to create an offensive or vexatious espionage, yet if such an evil results from the willful neglect of the company to keep the books, which would secure the right of the stockholder to inspect, without producing the evil, it is not the fault of the stockholder, but that of the company, and such neglect ought not to operate to his prejudice. To justify the refusal of the company to show the only book, the inspection of which would secure the right granted by the statutes to the stockholder, would, in effect, enable corporations to defeat or render nugatory the statutes, by means of a willful omission of duty by the officers of such corporation.

This cannot be tolerated. If the corporation does not keep the books which the statutes prescribe, it is its duty to permit an inspection of such as it does keep for the purpose of recording the transactions, which the statutes give the stockholders the right to know.

It may be added that the by-law referred to, makes the stock ledger evidence of the stock held by each stockholder. Every stockholder has a right to know who are qualified voters, and the number of votes each stockholder is entitled to cast. (*1 Seld. 567.*) How can he acquire this informa-

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tion otherwise than by an inspection of this book? It is said it would be wrong to issue the high prerogative writ of *mandamus*, for reasons of convenience merely. The answer to this is, that the relator is under no obligation to accept a substitute for that to which he is legally entitled. No power is vested in the officers of the company to compel him to take anything in lieu of that which the statutes give him. (1 *Seld. sup.*)

Such are my conclusions upon the case. It follows, therefore, that the motion must be granted.

COURT OF APPEALS.

ALEXANDER S. DIVEN, receiver of the Yates County Bank agt. ELIZABETH LEE, Executrix, and ALFRED LEE and THOMAS LEE, Executors of the last will of BENJAMIN LEE, deceased.

Proceedings to enforce the responsibility of the stockholders of a bank under the act of 1849, providing for winding up the affairs of the bank, are to be confined to stockholders; and the court is not to exercise jurisdiction over any who do not come within the definition of that term, as given in the second section of that act.

Where a judgment obtained under these proceedings, declared the defendant's testator to have been a stockholder in the bank, and directed the collection of the amount thereof, out of the assets in the hands of his executors, the defendants, when it appeared from the record itself that it had not been ascertained that the estate was chargeable, at the time the judgment was rendered—the report of the referee being that the executors individually were chargeable as stockholders; which report was ratified and confirmed by the court:

Held, that the court in rendering judgment against the estate, acted without authority, and the judgment was void for want of jurisdiction.

January Term, 1867.

APPEAL from an order of the supreme court rendered at general term in the fifth district, affirming an order of the surrogate of Onondaga county, dismissing proceedings instituted by the plaintiff to compel the defendants to account as executrix and executors of the will of Benjamin Lee, deceased.

The facts sufficiently appear in the opinion.

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SCRUGHAM, J. The appellant claimed the right as a creditor of the estate of Benjamin Lee, deceased, to compel the respondents, as executrix and executors of his will, to account before the surrogate of Onondaga county.

His character as such creditor depended upon the validity of the judgment which he had obtained in proceedings to enforce the responsibility of the stockholders of the Yates County Bank, under the act of 1849. (*Chap. 226.*)

The stock, from the holding of which the alleged responsibility arose, did not form part of the estate which was left by Benjamin Lee, at his death, as the bank was not then in existence, nor did his will contain any direction or authority to the executors to invest any of the funds of the estate in such securities, and it is not pretended that the investment was such as executors are authorized to make by law.

The stock could not, therefore, be properly considered the property of the estate, but rather that of the executors individually, and they, and not the estate, were responsible as stockholders.

Nevertheless, the judgment under which the appellant claimed, declared Benjamin Lee to have been a stockholder in the bank, and directed the collection of \$5,000 out of the assets in the hands of his executors, and the surrogate was bound to regard it as valid, unless it appeared that the court in making it acted without jurisdiction.

The proceedings under this act are of an anomalous character, and one only applicable to the particular business indicated in the act, to wit: the winding up of the affairs of banks of issue, when default shall be made by them in the payment of any debt or liability contracted after the 1st of January, 1850, and the enforcement of the responsibility of their stockholders.

The means prescribed for acquiring jurisdiction over the persons of the stockholders, are unknown to the common law, and quite different from those required in actions under the Code. Personal service of notice is not required in any

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case, and mere advertisement is sufficient as to all stockholders who do not reside in the county where the principal office of the corporation is situated.

Such a method of acquiring jurisdiction may be justified in the case of a stockholder, by the supposition that from his connection with the bank, and his interest in proceedings affecting it, he would be likely to hear of a fact so notorious as that its affairs had passed into the hands of a receiver, and, therefore, that a notice left at his house, or published in a newspaper, would be sufficient to give him knowledge of proceedings being taken to enforce his responsibility.

The entire inefficiency of such a method as to persons who are not so interested, and the limited object of the act as shown by its title and provisions, clearly indicate that the proceedings are to be confined to stockholders, and that in it the court is not to exercise jurisdiction over any who do not come within the definition of that term given in the second section of the act.

A careful reading of sections 17, 18, 19 and 20, will show that the jurisdiction of the court to judgment in the proceedings, depends upon the ascertainment in the manner provided by the act, of the fact that the person against whom it is given is a stockholder.

If evidence is offered to establish the fact, and the court passing upon it decide the question, the decision, though erroneous, will not render the subsequent judgment void, but only voidable; and the judgment will be conclusive until set aside or reversed by the court which granted it, or by some other court having appellate jurisdiction.

But if, on the contrary, no proof whatever is offered of the fact, and it is not ascertained as provided by the act, the court in proceeding to render judgment, undertakes to dispense with a condition precedent, upon which alone it is right to give judgment in proceedings under this act is founded, and its act will be void. (*Gallatin agt. Cunningham, 8 Cowen, 370.*)

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The record which was produced before the surrogate, does not show that any evidence was offered to establish the responsibility of the estate of Benjamin Lee, deceased, as a stockholder of the bank, or that it was ascertained in any manner that his estate was chargeable as such, according to the rules and principles declared in the act.

The report of the referee, whose duty it was among other things, to ascertain the persons who were chargeable as stockholders, was not in any manner modified or amended by the court, but was in all things ratified and confirmed, and it does not state that the estate is responsible, but that the executors are, individually.

The language of the report in this respect is as follows : " And I do hereby, in pursuance, &c., find, decide and report, that the several persons whose names are embraced in the list of stockholders assessed in schedule E, hereto annexed, and forming a part of this report, and to which I respectfully refer, are the stockholders of the said president, directors and company of the Yates County Bank, who are responsible individually to the entire amount of the stock held by them for the debts, &c. ;" and the entry in the schedule is as follows : " Elizabeth Lee, Alfred Lee and Thomas Lee, executors, &c., of Benjamin Lee, deceased."

In view of the fact that the act intends a discrimination in all cases where trust funds are invested in the stock, providing that the trustee shall be regarded as a stockholder, and individually responsible, in case the investment shall have been made by him voluntarily ; and expressly declaring that no trust funds in his hands shall be in any way liable under the provisions of the act, by reason of any such investment ; it cannot be successfully contended that this report alleged the responsibility of the estate, or that its language is capable of any fair construction other than as a declaration of the individual responsibility of the executors, and that they are individually chargeable as stockholders. This being so, the court was authorized upon the coming in of the report to make an

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order of confirmation, which should be final as a judgment against the executors individually.

It was not, however, concluded by the report, but the justice holding the special term might hear the allegations of the parties and persons interested, and modify or amend the report, and afterwards at special term confirm it as so amended.

In this proceeding it might doubtless be ascertained that the estate was chargeable, and not the executors individually, as alleged in the report, and then the order of confirmation might properly contain a direction that the sum charged in the apportionment against the executors, should be collected out of the assets in their hands as such.

As the court in which the proceeding is taken, is a court of general jurisdiction, it is to be presumed that it acted within its jurisdiction in granting the judgment which it gave, unless the contrary appear; and it may be that the surrogate would have been required to presume that the referee's report had been amended before confirmation, in such manner as to justify the judgment, if such presumption were consistent with the declaration of the order of confirmation, in which the judgment is announced; but such presumption is entirely inadmissible in presence of the most important declaration of the order, that the referee's report is in all things ratified and confirmed.

It appeared, therefore, from the record itself, that it had not been ascertained that the estate was chargeable at the time the judgment was rendered; and as the ascertainment of that fact is a condition precedent to the judgment, directing that the amount charged against the executors on the apportionment, should be collected out of the assets in their hands, as such, the court, in giving that judgment, acted without authority. The order should be affirmed.

Judges PORTER, PARKER, GROVER and DAVIES, Ch. J., concurred.

Judges HUNT, WRIGHT and BOCKES, were for reversal.

Order affirmed.

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SUPREME COURT.

PERRY H. EWING agt. JOHN H. JOHNSON.

Where the defendant, for a valuable consideration, sold to the plaintiff, all his stock in trade, fixtures, boxes, horses, wagons, &c., and all the right, interest, privileges and advantages acquired and possessed by him for the prosecution and continuance of the business of pedling and selling a certain kind of tobacco, &c., upon a certain described route, embracing the cities of Albany and Schenectady, and villages of Greenbush, &c.; and covenanted and agreed that he would not in any manner interfere with, hinder or obstruct the plaintiff in the prosecution of his said pedling business in the district, or over the route, at or about the places mentioned, and that he would not do or say anything to his old customers to discourage or hinder the plaintiff in the said business:

Held, that it was a violation of this agreement, for which an injunction would lie, where the defendant started the same business of pedling and selling tobacco, &c., in the same district and vicinity; although he acted as agent, and sold other tobacco besides that which the plaintiff sold. Neither as *principal or agent*, had the defendant a right to interfere with or to obstruct the plaintiff in the prosecution of the business he had transferred to him.

Such an agreement is not void as being in restraint of trade, as the restraint is not unreasonable, applied to such a district or territory.

Where there is a conflict of evidence upon the fact whether the *original injunction order* was shown to the defendant at the time of the service of a copy of it, and there being a probability that the defendant was mistaken as to that fact, and he having full notice of all the proceedings, the service will be held sufficient.

Albany Special Term, March, 1864.

MOTION by defendant to dissolve injunction, and motion by plaintiff for an attachment against the defendant for the violation of an injunction order issued in the above entitled action, by Hon. GEORGE WOLFORD, county judge of Albany county, November 21, 1863, restraining the defendant, his attorneys, &c., and commanding them to desist and refrain from pedling, selling, or offering to sell, tobacco in papers or packages, in large or small quantities, whether prepared for smoking or chewing, in the cities of Albany and Schenectady, and in the villages of Greenbush, &c.; the whole constituting the tobacco route sold and transferred to the plaintiff by the defendant, by an agreement in writing executed by the defendant, and bearing date July 31, 1862; and from selling, or offering to sell such tobacco to any of the tobacco dealers

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or former customers of the defendant, &c., upon said route; and from in any manner interfering with, hindering or obstructing the plaintiff in the prosecution of his business of pedling and selling E. Goodwin & Brothers' tobacco in said places, and upon said route.

The motions were heard together.

C. B. COCHRANE, *for plaintiff.*

L. TREMAIN, *for defendant.*

MILLER, J. The defendant, by an arrangement with E. Goodwin & Brothers, was supplied with their tobacco, which he was to sell within the limits provided in the injunction order issued in this cause. The plaintiff alleges that the defendant was to establish a route and exclusively occupy it, within the limits aforesaid, for pedling said tobacco, and that he did so establish and occupy said route, which was well known and defined, and had secured upon the same, and the places adjacent thereto, a large number of regular and profitable customers, whom he was in the habit of constantly and exclusively supplying with said tobacco, and had acquired the good will of said route, &c., which was of great value.

Although some of the foregoing allegations are denied by the defendant, yet I think they are substantially established by the affidavits in the case.

It also appears, and is not denied, that the defendant proposing to sell said route and the good will thereof, with his stock in trade, fixtures, boxes, horses, wagons, &c., with the advice and consent of Goodwin & Brothers, made and entered into an agreement in writing, reciting that he was engaged in the business of pedling and selling tobacco, &c., upon said route, and had obtained exclusive rights and privileges respecting the sale thereof upon said route to the dealers at or near the places named, and in consideration of one dollar, did sell, assign and convey to the plaintiff, all the right, interest, privileges and advantages, acquired and possessed

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by him, for the prosecution and continuance of the said business, at the said places and upon the route above mentioned, together with all the good will of his said business. And the defendant covenanted and agreed that he would not in any manner interfere with, hinder or obstruct the plaintiff in the prosecution of his said pedling business in the district or over the route, at or about the places mentioned, and that he would not do or say anything to his old customers to discourage or hinder the plaintiff in the said business.

It is conceded that since the injunction was issued and served upon the defendant, that the defendant has been engaged in pedling and selling tobacco upon the route in question, and that he was employed by one Watts, for that purpose, receiving a compensation from him. There is some similarity in the packages sold by the defendant and those manufactured by Goodwin & Co., which might deceive a person who failed to make a critical examination.

From the defendant's familiarity with the route in question, his acquaintance with the customers upon it, and other circumstances, it is by no means difficult to perceive that serious injury might be inflicted upon the plaintiff, and his rights very much prejudiced by the defendant's conduct.

The defendant had not only sold his interest and the privileges and advantages acquired for the prosecution of the business, but his good will in the concern, and agreed not to interfere with, hinder or obstruct the plaintiff in its prosecution.

Here is a direct interference on the part of the defendant, which could not fail seriously to affect the plaintiff's interests. It was an infringement upon the privileges and advantages he had sold to the plaintiff, which was calculated to impair the business of the plaintiff to a great extent, and if extensively pursued, might utterly deprive him of the benefits to be derived from such a contract; with the facilities acquired by a long experience upon the route in question, the defendant might, without much difficulty, entirely destroy the advantages he

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had transferred. It was certainly a violation of that part of the contract which transferred the good will of the business, as it showed a determination to build up another business at the expense of the plaintiff.

It would be a violation of such a contract, when a person had sold out his interest and good will in a business, and covenanted not to engage in the same business, if he started it again in the same vicinity. Such was really the case here. It makes no difference that he acted as agent; and sold other tobacco besides that of Goodwin & Brothers. Neither as principal or agent, had he a right to interfere with or to obstruct the plaintiff in the prosecution of the business he had transferred to him. And if the sale of other tobacco did this, as is quite evident, then the conduct of the defendant was clearly a violation of the contract, and unless there are some legal obstacles in the way of sustaining the injunction, the plaintiff is entitled to the usual remedies in such cases.

Various objections are made to the injunction order itself, as well as to the application for an attachment; the most important of which I will proceed to consider so far as may be essential for a proper disposition of the motions before the court. It is urged that the agreement is void as restraining trade in too extensive a territory. I incline to think that the restraint is not unreasonable, and that it can be upheld within the principle of adjudicated cases. (*See Noble agt. Bates, 7 Cow. 307; Chappel agt. Brockway, 21 Wend. 157; Dunlop agt. Gregory, 10 N. Y.; 6 Seld. 241; Holbrook agt. Waters, 9 How. 335, and authorities there cited; Mott agt. Mott, 11 Barb. 127; Niver agt. Rossman, 18 Id. 50.*)

I am also of the opinion that a sufficient consideration existed for the execution of the agreement. The plaintiff purchased personal property and stock in trade of the defendant, for a valuable consideration, which was entirely adequate for the purchase made.

The allegation made, that the plaintiff has not been able to accommodate the dealers upon the route, is not fully sus-

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tained, and, I think, adequately met by the affidavits of the plaintiff, showing the reason of a failure to do so on the occasions alleged.

It is further urged that the injunction order in this cause was properly served, as the original order was not shown to the defendant at the time of its service. There is a contradiction in the affidavits upon the point whether the original order was shown to the defendant, although it appears that a copy was served.

It was formerly held that if the defendant or his attorney was present in court when the motion for an order of injunction was made, the defendant would be liable for a contempt. (*2 Mad. Ch. Pr.* 225.) See also *Morrison agt. Brown* (*4 Paige*, 405), where it was held that a party is in contempt for not obeying an order served upon his solicitor, whose knowledge of such service was brought home to him, in the same manner as if the order had been served on him personally.

There are one or two recent cases which appear to look the other way (*4 Sandf.* 639; *8 How.* 68), but the question was not distinctly raised upon a motion for an attachment for an alleged contempt; and with a strong probability that the defendant may be mistaken in reference to the order being shown to him, as he had full notice of all the proceedings, I am inclined to hold that the service was sufficient. The other points presented by the defendant are not available.

The motion to dissolve the injunction must be denied, with ten dollars costs of opposing the same, and there must be an order of reference to ascertain and report the amount of damages sustained by the plaintiff by reason of defendant's violation of the injunction order.

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OSWEGO COUNTY COURT.

IN THE MATTER OF WILLIAM HENRY WRIGHT.

Where a *soldier* has been *honorable discharged*, under an order of the war department musterling the regiment in which he served, out of service, such discharge exempts him from the performance of further military duty, even if he stands as a drafted man in another company at the time of his discharge from the army.

A *court martial* is a court of special and limited jurisdiction. It is called into existence for special and temporary purposes, and when these purposes are attained, it is dissolved and disappears. No general duty or power, with respect to the collection of the *fines* is conferred upon the president of the court; and he is required to exercise such power as is given him in a specified way, and within a specified time.

The first warrant shall be drawn within thirty days after the fines have been imposed, and the same may be renewed, or a new one issued at any time thereafter, within two years from the time of imposing the fines.

A warrant against a person issued on the 25th day of June, 1867, reciting that the fine was imposed upon the 25th day of April, without specifying the year, is defective upon its face, and does not justify the holding the person fined under it.

HABEAS CORPUS issued out of the supreme court, directed to Henry Breed, constable, returnable before the county judge of Oswego county. The constable returned to the writ that he held the petitioner upon a military warrant for the collection of a fine imposed by a regimental court martial, and gave a copy of the warrant.

The petitioner answered the return of the officer, denying that he was legally detained by virtue of a warrant, as set forth in the return, and alleging facts to show that the court martial referred to had no jurisdiction to try and convict him, and that he was exempt from militia duty.

Case tried at the chambers of the judge, November 15, 1867.

S. N. DADA, for petitioner.

J. C. HUNT, Judge Advocate, for military authorities.

R. H. TYLER, County J. The evidence before me shows that the petitioner volunteered to serve in the U. S. army on the 25th day of August, 1864, at which time he was a resident of

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tal town of Palermo, within the bounds of the 88th regiment—the district, N. Y. N. G., and that he served regularly in company I, 184th regiment of New York volunteers, until the 29th day of June, 1865, when he was honorably discharged, under an order of the war department mustering the regiment out of service.

After the petitioner returned home to Palermo, he was notified to attend several parades of company G, 88th regiment N. Y. N. G., of which he was claimed to be a private; and also to attend several musters of the regiment.

A court martial was ordered for the trial of delinquents of the regiment, which commenced its sitting on the 25th day of April, 1867, at which the petitioner was returned as a delinquent, and the usual summons was issued to the petitioner to appear before the court martial on the 14th day of May, 1867, which was served by leaving a copy at the residence of the petitioner in his absence from his home, and the petitioner never had any actual notice of the court martial until after his case had been passed upon, and confirmed by the brigadier general.

On the 14th of May, there was no appearance before the court martial by the petitioner, and his case was continued until the next day, when it was disposed of, in his absence, by a fine of \$20. The sentence was reported to the brigadier general, and approved May 22, 1867; and on the 25th day of June, 1867, the president of the court issued his warrant, under his hand and seal, for the collection of the fines imposed by the court martial, annexing a list, among which was the name of the petitioner, which warrant recited that "at a regimental court martial, held on the 25th day of April, the several delinquents named, were duly fined;" and then the officer to whom it was directed, was commanded to collect the fines in the form prescribed by the militia law, and was dated June 25, 1867, and was renewed from time to time, the last renewal October 30, 1867.

The evidence further shows, that the petitioner had never

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enrolled himself as a volunteer in the N. G., and he had never been served with a notice that he had been drafted therein, and there was no evidence that he had ever been drafted, unless the return to the court martial was evidence of that fact. The question is presented, whether, upon these facts, and upon the warrant put in evidence, the officer is entitled to hold the petitioner longer in custody.

By the militia law now in force, all able-bodied white male citizens, and persons of foreign birth who shall have declared their intention to become citizens, pursuant to law, between the ages of eighteen and forty-five, residing in the state, are subject to military duty excepting certain classes ; and among the persons excepted are those "who have been regularly and honorably discharged from the army or navy of the United States, in consequence of the performance of military duty in pursuance of any law of this state." Under this provision of the statute, it is very clear that the petitioner is not subject to military duty, nor was he at the time he was returned as a delinquent. But it is alleged that he was drafted into the National Guard, before he was discharged from the army, and being once a member of the militia, his discharge does not relieve him. The answer to this is, in the first place, there is no evidence that he was drafted before he was discharged, if there is any evidence that he was ever drafted at all ; and it is admitted that he never volunteered. But if he stood as a drafted man at the time of his discharge from the army, I am of the opinion that his discharge exempts him from the performance of further military duty.

But it is said that the question of the liability of the petitioner to do military duty, was necessarily involved in the trial by the court martial, and that the finding of that tribunal is conclusive until reversed on *certiorari*. There is some plausibility in the position, but I think it is nevertheless untenable. It was entirely a question of jurisdiction, and I am of the opinion that the finding of the court martial that it had jurisdiction, is not conclusive upon *habeas corpus*. The writ

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of *habeas corpus* is designed as a searching and inquisitorial process, and although the warrant issued by the court martial, if legal on its face, would be a protection to an executive officer, it may be shown to be void by reason of a want of jurisdiction in the court from which it emanates. If it was the case of a final judgment or decree of a competent tribunal of civil or criminal jurisdiction, the rule of course would be different; but I do not regard the sentence of a court martial in that light, and my conviction is strengthened by the fact that the legislature were careful to provide that "no action shall be maintained against any member of a court martial or officer or agent, acting under its authority, on account of the imposition of a fine, or the execution of a sentence on any person, if such person shall have been returned as a delinquent, and duly summoned, and shall have neglected to appear and render his excuse for such delinquency, or show his exemption before such court." It seems to me that if the finding of the court, in the case of an exempt person, was conclusive in any event, this provision of the statute is obviously useless, because the judgment of the court would be a perfect protection of itself.

But there is another reason why the petitioner must be discharged from the custody of the officer, and that is, that the warrant by virtue of which the prisoner is held, is invalid upon its face. The only power found for issuing this warrant is contained in the statute, which provides that "the president of the court shall, within thirty days after the fines have been imposed, make a list of all the persons fined, and shall draw his warrant, under his hand and seal, directed to any marshal, sheriff or constable, thereby commanding him to levy such fines," &c.; and the officer has forty days from the receipt of the warrant to execute it, and "if any officer having a warrant for the collection of any fine, shall not be able to collect the fine within the time specified therein, then the officer issuing the warrant, may, at any time within two years from the time of imposing the fines, issue a new war-

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rant against any delinquent, or renew the former warrant from time to time, as may become necessary."

Now every lawyer understands that a court martial is a court of special and limited jurisdiction. It is called into existence for special and temporary purposes, and when these purposes are attained, it is dissolved and disappears. All its powers are, therefore, special and limited. No general duty or power, with respect to the collection of these fines, is conferred upon the president of the court, and he is *required* to exercise such power as is given him in a specified way, and within a specified time. The first warrant *shall* be drawn within thirty days after the fines have been imposed, and the same *may* be renewed, or a *new* one issued at any time *thereafter*, within two years from the time of imposing the fines. (*Militia Code*, §§ 225 and 246.)

This warrant against the petitioner was issued on the 25th day of June, 1867, and recites that the fine was imposed upon the 25th day of April, without specifying the year, and for aught that appears, it may have been April, 1865, which would have been more than two years prior to the issuing of the warrant; and certainly the president can find no power in the law for issuing his warrant after the expiration of two years from the time the fines were imposed, and if we are to *infer* that the fines were imposed on the 25th day of April, 1867, *then* the warrant was not issued until two months had elapsed, when the statute says it *shall* be done *within thirty days* after the fines were imposed. It seems to me that this warrant, which affects the liberty of the citizen, should show upon its face the time when the fine was imposed, and that such warrant was actually issued within the time within which the officer has the power to issue it; and the process failing to show this, I think that it is defective upon its face, and does not justify the holding of the petitioner in custody.

For the double reason, therefore, that the court martial had no jurisdiction of the person of the petitioner, and also

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that the warrant upon which he is held is invalid upon its face, the petitioner must be discharged.

Ordered accordingly.

—————

N. Y. SUPERIOR COURT.

WILLIAM MOSES, plaintiff agt. GEORGE W. BANKER and others, defendants.

In granting an order to compel a party to make an *affidavit* to be used on a motion, under section 401 of the Code, the judge must be satisfied by competent and sufficient proof, *First*. That the party applying for it intends to make or oppose a motion; and *Second*. That it is necessary for him in making or opposing such motion to have the deposition of some person who refuses to make a voluntary affidavit. It is usual to take the affidavit of the attorney applying for the order, as competent and sufficient proof of these matters.

But where it appears from the affidavit upon such application, that the motion intended is merely to make an *answer more definite and certain*; or that the person whose deposition is required is *incompetent*; or that the real object of the applicant is, under the guise of a motion, to *obtain an examination* which he otherwise could not get, the court is bound to refuse the order.

Such an *ex parte* order affects the right of the opposite party, which authorizes him to move to set it aside, as he has a right to attend on the examination with his counsel and to cross-examine; and besides such attendance subjects him to trouble and expense.

The order in this case set aside, on the ground that it appeared from the pleadings and papers, that it was not intended for the legitimate purpose of obtaining depositions to be used on a motion, but for some other purpose; such perhaps as enabling the plaintiff to ascertain what line of proof it will be necessary for him to prepare to meet on the trial.

Besides, the plaintiff had waited before making his application, until his cause had been twice called for trial, and it could have been tried on its merits sooner than the motion could have been determined.

Special Term, February, 1867.

HAMILTON ODELL, *for motion.*

NATHANIEL NILES, *opposed.*

JONES, J. The complaint alleges that defendants are co-partners; that plaintiff sold and delivered to them as such co-partners, certain goods of the value of \$1,127.57, and

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that defendants have not paid said sum; and then demands judgment for the said sum.

The answer denies the sale and delivery; also denies that plaintiff at the time of the alleged sale and delivery was the owner; and alleges at that time the goods were the property of one Wm. K. Van Bokkelen, for whose benefit the answer alleges the suit is prosecuted.

The issue was joined in August, 1866.

The cause was reached for trial on the 18th day of January, 1867, and neither party being ready, it was set down for the 24th of January, 1867. On that day it was again called for trial, and neither party being yet ready, it went off for the term.

On the 31st of January, 1867, plaintiff procured an *ex parte* order appointing a referee to take the depositions of various persons, and among them one of the defendants, to be used on a motion.

This order was made upon an affidavit sworn to by plaintiff's attorney, in which it is merely stated that the action is brought to recover for goods sold and delivered by plaintiff to defendants; that the deponent intends to make a motion to strike out the answer as sham, or to compel the defendants to make the answer more specific and definite; that the deponent deems it necessary to have the affidavits of certain persons named to use on the motion, and that he has applied to them to make affidavits, but they have refused.

The defendants' attorney now moves to set aside the *ex parte* order of January 31st, and reads the pleadings in the action and his affidavit, by which the issues joined, and the various proceedings in the action, as above set forth, are now for the first time presented to the notice of the court.

In opposition to the motion to set aside, plaintiff's attorney reads an affidavit sworn to by himself, setting forth that since the cause was reached on the calendar, facts have come to his knowledge which lead him to believe that the answer is sham,

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and was put in with intent to delay, and ultimately defeat the collection of plaintiff's claim.

Section 401 of the Code provides, that "when any party intends to make or oppose a motion in any court of record, and it shall be necessary for him to have the affidavit of any person who shall have refused to make the same, said court may, by order, appoint a referee to take the affidavit or deposition of such person."

The order of January the 31st, was obtained under this section.

To authorize the granting of an order under this section, the judge who grants it must be satisfied by competent and sufficient proof, first, that the party applying for it intends to make or oppose a motion; and second, that it is necessary for him in making or opposing such motion, to have the deposition of some person who refuses to make a voluntary affidavit.

It is usual to take the affidavit of the attorney applying for the order, as competent and sufficient proof of these matters. But if on the face of such affidavit, it appeared either that there was no intention of making or opposing a motion, or that the deposition desired was not necessary, or that the court had no power to order the party whose deposition was desired, to make it, then without doubt the court would be bound to refuse the order. Thus, if such affidavit showed that the motion intended was merely to make an answer more definite and certain, as such motion is to be determined on the pleadings alone, no deposition of a witness could possibly be necessary; or if it appeared by such affidavit that the person whose deposition was required was incompetent, the court would have no authority under section 401, to authorize his examination; or if although the attorney in such affidavit, swears generally that he intends to make a motion, and that he desires the deposition of a particular person for such motion, it yet appears from other facts set forth in his affidavit, that his real object is, under the guise of a

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motion, to obtain an examination which he otherwise could not get ; in all these cases, and perhaps others which do not now occur to me, the court would be bound to refuse the order.

It may be urged that the order does not affect any right of the opposite party, and that, therefore, after it is made the opposite party has no right to move to vacate it on the ground that it appears on the face of the papers on which it is founded that it should not have been granted, and much less on the ground that on facts which do not appear on the face of the papers, it should not have been granted.

I think the order does affect the right of the opposite party. He has a right to attend on the examination with his counsel, and to cross-examine, as has been recently held by the general term of this court. Such attendance subjects him to trouble and expense, and this gives him a sufficient interest to entitle him to move to vacate the order. Such motions, however, are not to be encouraged, and should be granted only in cases when it clearly appears that the order is unauthorized, or that a legitimate use of the powers of the court is not the object for which the order was obtained.

In this case it seems to me, speaking from the papers, that this order is not intended for the legitimate purpose of obtaining depositions to be used on a motion, but for some other purpose, such perhaps as enabling the plaintiff to ascertain what line of proof it will be necessary for him to prepare to meet on the trial, or perhaps to ascertain whether it would be safe for him to call these persons as witnesses on the trial.

The issues raised by the answer are as to whether the plaintiff sold and delivered the goods in question to defendants, and as to whether he owned the goods, and as to whether this action is brought for his benefit.

Surely the plaintiff when this action was commenced, must have known whether he owned the goods or not, and must have been possessed of the requisite proof to sustain these facts. When the answer was sworn to, he must have known

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that in these particulars it was false. It could not have been necessary for him to wait five months to find out whether it was false in these particulars, nor to ascertain whether he had proof enough to establish his own ownership and right to commence the action for his own benefit. But although he might be able to show the falsity of the answer in this respect, yet he could not succeed in a motion to strike out the answer as false, unless he could show that the issue raised as to whether the goods were sold and delivered to the defendants was also false.

If this sale and delivery had been conducted in the manner in which sales and deliveries of goods are ordinarily conducted, and no serious question had been involved, there can be no doubt that plaintiff immediately on the coming in of the answer would have known its falsity, and taken measures to speedily procure a judgment on the ground of its falsity, and not have waited five months, allowed two chances for trying his case to pass by unheeded, and then for the first time only six days after he had neglected an opportunity to try his case, endeavor to obtain a judgment on motion.

There is a class of cases in which upon all the facts and law applicable thereto, there is grave doubt as to whom the sale was made.

In that class of cases, a motion to strike out an answer as false is manifestly improper, and it cannot be conceived that counsel could seriously entertain an idea of making such a motion.

The facts that appear before me, indicate that this action falls within this class of cases. On no other supposition can the plaintiff's delay in making the motion, and his neglect to take advantage of two opportunities to try his case, be accounted for.

But there is another ground which seems to me to be conclusive against the plaintiff. .

The object of a motion to strike out an answer as false, is to obtain a speedy judgment, without being subjected to the

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delay of waiting for the cause to be reached for trial. It is incredible that that object should actuate a plaintiff who has waited before making his motion until his cause had been twice called for trial; and especially is it incredible, where, as in this case, the action could have been tried on its merits as soon if not sooner than the motion could have been determined.

For these reasons I am clearly of the opinion that the order in question was not obtained for the legitimate purpose of procuring testimony to be used on a motion, and that consequently the order should be vacated.

Motion granted without costs.

COURT OF APPEALS.

MILES SHERIDAN, Administrator agt. THE BROOKLYN CITY AND NEWTOWN RAILROAD COMPANY.

In an action against a railroad company for negligence, in causing injuries and death where there is a conflict of evidence upon the facts, and the jury, by their verdict, adopt the view claimed by one of the parties, the appellate court will take the same view on the appeal.

It does not alter the liability of the defendants that the wrong of a third party concurred with their own in producing the injury.

A horse railroad company is guilty of negligence in not stopping their car when the strap attached thereto is pulled for that purpose to let off a passenger.

Where it was claimed by the defendants that the deceased passenger, a lad nine years of age, was in fault in going on to the front platform of the car, and was knocked off the car while in motion, by another passenger, and that none of the defendants' servants contributed to the act:

Held, that the jury having found that it was the very act of the conductor in placing the lad upon the front platform, in order to make room inside the car for other passengers, which produced the result, the defendants could not escape liability, although the lad was thrown off by another passenger in getting off while the car was in motion.

Ordinary capacity and ordinary care and attention in protecting themselves as passengers on a railroad, is all the law requires. This each is bound to give whatever his age or condition; and if he fails, he cannot call upon others to supply his deficiencies, or to compensate him for losses arising from its absence.

January Term, 1867.

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THIS was an action under the statute, brought by the plaintiff as administrator of Dennis Sheridan, deceased, to recover damages for the wrongful acts of the defendants, which resulted in the death of the deceased. The plaintiff recovered at the circuit, and the judgment was affirmed at the general term of the second district. The facts are more fully stated in the opinion of the court.

A. J. PARKER, *for appellants.*
JAMES EMOTT, *for respondent.*

HUNT, J. This is an action by the administrator of a boy nine years of age, against the defendants, a company running a horse railroad in Brooklyn, for causing the death of the boy by the negligence and misconduct of the defendants.

On the 15th of September, 1864, the deceased having paid his fare, was seated with a companion of his own age in the interior of a car of the defendants. The car began to fill up with passengers, and the conductor ordered the boys to get up and make room for adult passengers. They went forward in the car and took other seats, and were again ordered up, and objecting to give up their seats, were "put out" of their places by the conductor.

The car by this time had become very full, "very crowded." The deceased was crowded and pushed by the passengers in the car out on the front platform, which, as well as the inside of the car, was full of people.

While there, the car being in motion, there was a rush of another passenger to get off, and the deceased was thrown off the car, was run over, and received injuries from which he died. At the close of the evidence the defendants moved for a non-suit. The court denied the motion, and the defendants excepted. Upon the facts there was a conflict of evidence, and the jury by their verdict, adopted the view claimed by the plaintiff on the trial, and we are to take the

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same view on this appeal. It is this view which I have given above.

The defendants insist that the motion for a non-suit should have been granted, urging that there was negligence on the part of the deceased, in occupying a position upon the platform, and that the defendants were no more responsible than if the boy had been shot with a revolver, or struck with a club, by a fellow passenger. The question of the negligence of the deceased, in remaining upon the platform, was submitted to the jury, under the instructions hereafter to be considered. For the present we are to assume that the deceased was upon the platform by the express requirement of the defendants, and against his own remonstrances, properly, so far as the defendants are concerned. If, by the motion of the car, he had been thrown from this dangerous position, or by the continued pressure of the large crowd which the defendants had permitted upon their car, he had been pushed from his standing place, the defendants would have been liable. It does not alter this liability that the wrong of a third party concurred with their own in producing the injury. It may well be, that the young man was not justified in rushing through the crowd, and in aiding in throwing the deceased from the car; but this does not relieve the defendants' wrong. If they had not removed the deceased from his seat, and compelled him to stand upon the platform, he would have been unaffected by this illegal act of the young man. It was his violence, concurring with the defendants' illegal conduct in overcrowding their car, and in placing the deceased upon the platform, that produced the disastrous result. It is no justification for the defendants that another party, a stranger, was also in the wrong.

Upon the evidence, the jury would also have been justified in finding the defendants guilty of negligence in this, that the car was not stopped when the strap was pulled for that purpose. On this branch of the case, or on the other, there was no conflicting evidence. There was testimony on which,

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the jury might have found that the bell was rung twice before the young man reached the platform, and that the driver should have stopped the car. It was quite clear that if the car had been stopped, the accident could not have happened to the deceased in its full extent, as it appears that he was run over by the rear trucks, and there received the injury which resulted in his death. On both branches of the case, it was the duty of the court to leave the question of negligence to the jury, and there was no error in denying the motion for a non-suit.

At the close of the evidence, the defendants' counsel requested the court to charge the following propositions:

First. That the fact that the deceased was a child, makes no difference in the application of the rule of law, as to the question of negligence. If not of years of discretion, he should have a protector.

Second. The evidence showing that the deceased was knocked off the car while the car was in motion, and that none of the defendants' servants contributed to the act, the plaintiff cannot recover in this action.

Third. That the deceased was in fault in going on to the front platform, and although the defendants may have been guilty of negligence, yet when each party is guilty, there can be no recovery.

The court declined to charge otherwise than is set forth, to which the defendants excepted.

The second and third of their requests do not require much consideration.

Each of them is open to the objection of assuming as matter of fact what is not such, and what the jury found to be otherwise. Thus, the second proposition assumes that none of the defendants' servants contributed to the deceased being knocked from the car, and the third assumes that the deceased was in fault in going upon the platform.

The jury have found that it was the very act of the conductor in placing him upon the platform, that produced the

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result, and that he was not in fault at being there. If the second proposition was intended to be limited to the immediate act of throwing the deceased from the car, it was not sound in any respect.

The defendants cannot claim seriously that there was error in refusing to charge the proposition first requested, to wit : " That the fact that the deceased was a child, makes no difference in the application of the rule of law as to the question of negligence ; if not of years of discretion, he should have a protector." The question of negligence, as here set forth, arises upon the conduct of the deceased in taking care of himself, and also upon the conduct of the defendants in regard to the deceased. In the latter view, the rule asked for would not have been correct. A sick or aged person, a delicate woman, a lame man, or a child, is entitled to more attention and care from a railroad company, than one in good health and under no disability. They are entitled to more time in which to get on or off the cars ; they are entitled to more consideration when crossing a street, to the end that the cars shall not run over them. All of these classes are entitled to use the streets and to ride in the cars, and such haste in starting up, or such speed in driving, as would be reasonable care towards others, might well be carelessness and neglect toward them.

The proposition in question also embraces the degree of care necessary to be used by the deceased in taking care of himself. It embraces too much in any aspect, when it requested a charge as matter of law, that "if not of years of discretion, he should have had a protector." This would be a rule quite too rigid. There was no pretence that this boy was so young as to require a protector. The court did charge, that if the jury were of the opinion that the lad was negligent in any way, and his negligence contributed to the injury, the plaintiff could not recover ; but if there was no negligence on the part of the boy, and there was on the company, then he could recover. The rule of law was laid down

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generally, and the deceased, although a lad only, was required to conform to the standard—no exception or discrimination was made in favor of youth. It was not the province of the court to say, whether what the boy actually did, or omitted, constituted negligence—that was for the jury exclusively.

The court could only submit the general question of negligence to the jury, with instructions as to the law applicable to it.

No one, whether sick, lame, imbecile, or vigorous and youthful, is bound to exercise all the skill and all the care that the most capable and ready witted person could command. Ordinary capacity, and ordinary care and attention in protecting themselves, is all that the law requires. This each is bound to give, whatever his age or condition, and if he fails, he cannot call upon others to supply his deficiencies, or to compensate him for losses arising from its absence.

For the general principles that I have laid down, see *Ernst agt. The Hudson River R. R. Co.* (35 N. Y.); *Willis agt. L. I. R. R. Co.* (32 Barb. 398; affirmed in *Court of Appeals*, 34 N. Y. Rep. 670); *Benoist agt. N. Y. Central R. R. Co.*

I think the case was correctly tried, and that the judgment below should be affirmed.

All concur.

Affirmed.

COURT OF APPEALS.

**SAMUEL COTT, Executor of ISAAC COTT, deceased, respondent
agt. THE LEWISTON RAILROAD COMPANY, appellants.**

Under the general railroad act (2 R. S. 681), if a railroad company, in the construction of its road, find it necessary to change the channel of a stream, and thus divert its course, and for that purpose construct a new channel, the company is bound to keep such new channel in a suitable and proper condition, so as not only to restore but preserve the stream in its former state of usefulness, as near as practicable.

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January Term, 1867.

APPEAL from judgment of the supreme court.

In 1853, the plaintiff's testator owned a farm in fee, situate in the town of Niagara, across which run a small stream of water, supplying water for stock, &c. The defendants, a railroad corporation, having located its road through said farm, obtained from the testator a conveyance of the necessary land for its construction, and also the right of constructing its road through the adjoining farm, situate above the plaintiff, owned by Voght.

In the construction of the defendants' road, it became necessary to make a deep cut in the channel of the stream, which would deprive the plaintiff's testator of the use of the stream, by conveying the water into Niagara river, unless an artificial channel was constructed upon the lands of Voght. For this purpose, the defendants acquired from Voght the right of constructing a new channel for the stream upon his land, and in the fall of 1854, made the channel and turned the stream into it, which conducted the water to the testator's farm, in the same manner as before. During the ensuing winter, the new channel was made upon the upper side of the said road, and parallel with the deep cutting therein through limestone rocks, and in the spring of 1855, the water commenced escaping from the new channel through the fissures in the rocks into the deep cutting of the railroad, and continued so to escape in such quantity as to deprive the plaintiff for a considerable portion of the year, of the entire water of the stream. It appeared upon the trial, that the new channel upon Voght's farm might have been repaired at a small expense, so as to prevent the escape of the water therefrom, and thus preserve the utility of the stream for the testator's farm. The defendants totally neglected to repair the channel, and the testator in March, 1859, commenced this action to recover his damages for the diversion of the water. Upon the trial at circuit, the defendants' counsel requested the court to charge the jury in substance, that if

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the defendants made the new channel suitable and proper to preserve therein and conduct the stream of water upon the farm of the plaintiff as it had before ran, as far as it could be discovered at the time, although the water should subsequently escape and be diverted from causes not discoverable at the time, or from other causes, such as fissures in the rocks, &c., caused by the elements subsequently, the plaintiff could not recover. The court refused so to charge, and defendants' counsel excepted.

The court in substance charged that the defendants were bound to restore the stream as near as practicable to its former state of usefulness, and if it had not done so it was still its duty so to do, and that if the plaintiff had sustained damage from a neglect of this duty, he was entitled to recover. The defendants' counsel excepted to this portion of the charge. A verdict was rendered for the plaintiff, upon which judgment was entered, which was affirmed upon appeal by the supreme court. Whereupon the defendants appealed to this court.

GROVER, J. The exceptions to the refusal of the court to charge as requested, and to the charge as given, fairly, I think, raise the question whether, if a railroad company in the construction of its road find it necessary to change the channel of a stream, and thus divert its course, and for that purpose construct a new channel, the company is bound to keep such new channel in a suitable and proper condition, so as not only to restore but to preserve the stream in its former state of usefulness, as near as practicable.

The fifth clause of section 34 of the general railroad act (2 R. S. 681), among other things, empowers railroad companies to construct their road across, along or upon any stream of water, water course, &c., which the route of its road shall intersect or touch, but requires the company to restore the stream or water course to its former state, or to such a state as not unnecessarily to have impaired its usefulness. The posi-

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tion of the defendants is, that having constructed the new channel with proper care, and in such a manner as that for the time being the stream is restored to its former state of usefulness, and for aught that can then be discovered, will permanently so remain, the company is thereby relieved from all responsibility, although it should turn out from the nature of the soil or rocks through which such new channel is constructed, it in a few months permitted the escape of the entire water, and thus, as in the present case, an owner of land situate below the point where the new channel is constructed, is wholly deprived of the use of the stream. I am unable to assent to this position. It is insisted that it is a fair deduction from the doctrine of *Billinger* agt. *The New York Central Railroad* (23 N. Y. 42), and kindred cases.

That principle is, that when legal authority for interposing with a stream upon making compensation exists, the party interfering is not absolutely responsible for a consequential injury arising therefrom, but only where such injury is the result of negligence on his part; an examination of that case will show that although the apertures for discharge of the water through the embankment were properly constructed, and that due care was taken at the time to secure sufficient capacity for that purpose, yet if subsequent experience showed them deficient, the company was bound to make them suitable and proper for that purpose, and a neglect so to do so would render them liable. The duty imposed upon the company in the present case, was to restore the stream to its former state of usefulness as near as might be.

The company had the right to divert the stream, and construct the new channel therefor, if necessary for the construction of its road, and having the legal right to do this were not responsible for the consequential injuries to others while the work was being done, if prosecuted with proper energy and dispatch. The change in the stream was made by the road for its own benefit. The plain intention of the statute in such a case is, that the company shall restore the

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stream to its former proprietors as little impaired in its utility as practicable, so as to subject such owners to no loss or injury, or at any rate to make the loss as trifling as possible.

To effectuate this clear intent, it must be held that the company must not only, in the first instance, make the channel as perfect as practicable, but continue and preserve it in that state as long as it continues to divert the water from its natural channel.

The testator had the right, as owner, to the continued, undiminished flow of the stream in its natural channel over his farm, and of this right he could not be deprived by the legislature, without compensation. This right only includes the water flowing in the stream, and does not embrace any surface drainage that may flow into the Niagara river through the defendants' cutting for their road.

This cutting the defendants had a right to make, and for the flowing of surface drainage through it there is no liability.

The defendants' counsel cites authorities showing that an owner digging in his soil, and thereby severing a vein of water running below the surface, and causing a spring upon the lands owned by another below, is not responsible for thus destroying the spring, for the reason that the digging being lawful, there is no liability for the consequences of the act.

That principle is not at all applicable to the present case. In this, but for the legislative permission for public purposes, the defendants had no right, nor had Voght the power to grant to it any right to divert the stream from its natural channel to the prejudice of the testator. That permission is given, charged with the duty of restoring the stream to the testator as near as practicable to its former usefulness.

This is not by any means done, if the testator has it restored burdened with the charge of keeping the new channel in repair.

That is a burden to which his previous enjoyment of the stream was not subject, which charge may exceed the whole value of the stream, and thus deprive the testator of his entire

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property therein. A construction leading to such a result must be rejected.

The judgment appealed from must be affirmed.

All concur.

SUPREME COURT.

THE ST. PATRICK'S ORPHAN ASYLUM and others agt. THE BOARD OF EDUCATION OF THE CITY OF ROCHESTER.

Where moneys are raised in cities and districts for school purposes, the schools of the several incorporated *Orphan Asylum Societies* within the state, other than those in the city of New York, are entitled under the act of 1850, to distribution thereof in the same manner and to the same extent, in proportion to the number of children educated therein, as the common schools in their respective cities and districts. But moneys devoted by the constitution of the state for the support of common schools, cannot be lawfully appropriated to the support of such asylums, or for the support of common schools therein, as the latter is not a common school within the constitutional meaning of the term "common schools." (*People agt. Board of Education, Brooklyn*, 13 Barb. 400; *People ex rel. Brooklyn Orphan Asylum agt. Board of Education, Brooklyn*, Ms. Court of Appeals.)

Monroe General Term, September, 1867.

Before WELLES, JOHNSON and E. DARWIN SMITH, Justices.

*T. C. MONTGOMERY and W. J. SHERIDAN, for plaintiffs.
E. A. RAYMOND, for defendants.*

By the court, E. DARWIN SMITH, J. The legislature in 1850, passed an act entitled "an act to provide for the better education of the children in the several orphan asylums in this state other than in the city of New York," the first section of which is as follows:

"The schools of the several incorporated orphan asylum societies within this state, other than those in the city of New York, shall participate in the distribution of the school moneys, in the same manner, and to the same extent, in proportion to the number of children educated therein, as the common schools in their respective cities or districts."

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This section is very clear and explicit. It declares that the children educated in the orphan asylums of the state, out of the city of the New York, shall participate in the distribution of the school moneys, in the same manner, and to the same extent as the common schools in the respective cities and districts.

The question submitted to us is whether this is a valid law. It clearly has not been repealed by subsequent legislation, and is still in force. The common school system of this state was originally a creature of the legislature.

In section 10, of article 7, of the constitution of 1822, it is provided "that the proceeds of all lands belonging to this state, except such parts thereof as may be reserved or appropriated to public use, or ceded to the United States, which shall hereafter be sold or disposed of, together with the fund denominated the common school fund, shall be and remain a perpetual fund, the interest of which shall be inviolably appropriated and applied to the support of common schools throughout this state."

And section 1, of the 9th article of the constitution of 1846, is as follows:

"The capital of the common school fund, the capital of the literature fund, and the capital of the United States deposit fund, shall be respectively preserved inviolate. The revenue of the common school fund shall be applied to the support of the common schools. The revenues of the said literature fund shall be applied to the support of the academies, and the sum of \$25,000 of the revenue of the United States deposit fund, shall each year be appropriated to and made part of the capital of the said common school fund."

These provisions of the constitutions of 1822 and 1846, recognize as existing, a common school system for the state, and continue the same as a permanent institution. The primary policy and intent of the legislature in establishing common schools, and of these provisions in the constitutions of the state, was to secure and perpetuate a system of schools,

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which should embrace as far as possible, the education of every child of the state. And I should have thought if the question were an original one, that a discretion must exist in the legislature to provide in furtherance of this policy, for the education of poor orphan children in any mode essential or best adapted to that end, even though they did not receive such education in schools ordinarily called common schools, and that orphan schools, or schools kept in orphan asylums, might be regarded as common schools, within the spirit and intent of the constitution, in furtherance of this policy; but in the case of *The People agt. The Board of Education of Brooklyn* (13 Barb. p. 400), this court at general term in the second district held otherwise; and held that an orphan asylum was not a common school within the constitutional meaning of the term common schools, and that for that reason no portion of the moneys devoted by the constitution for the support of common schools, could be lawfully appropriated to the support of such asylums, or for the support of schools therein. In this view of this constitutional provision, the court of appeals seems to have concurred, in the case of *The People ex rel. The Brooklyn Orphan Asylum agt. The Board of Education of the City of Brooklyn*, or such was the opinion of Judge DENIO, who gives the opinion of the court in that case, a manuscript copy of which has been furnished to us on the argument. I do not see, therefore, why these decisions are not binding upon us on that question.

But in that case moneys were raised in the city of Brooklyn for school purposes, and the constitutional provision was held not to apply to such moneys.

This was particularly so held in this court, in the opinions of Judges BROWN and STRONG, in the last mentioned case, and so far these opinions and judgment in that case on that point, was approved in the court of appeals.

Within the authorities of these two cases, I do not see, therefore, why the plaintiffs are not entitled to share in all the money raised in the city of Rochester, or received by the

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defendants for school purposes, except the money received from the state from the school funds referred to in the constitutional provision aforesaid.

Of the moneys so raised in the city of Rochester, the plaintiffs are entitled to share in a rateable proportion for the children taught by them, with the other children of the city attending the public schools under the charge of the board of education, precisely the same, and upon the same principles, as if they attended such schools.

The legislature clearly intended to put orphan asylums upon the same footing and position with the common schools, and to include them within all provisions of law applicable to such schools.

They are subject to the rules and regulations and oversight of the board of education, in the same manner as the common schools in the cities and districts of the state, by the express provisions of section two of the said act. And the defendants are bound to treat them, so far as they are in fact schools for orphan and indigent children, precisely as if they were in separate districts, or were common schools; in fact, except in respect to the money received from the state, I see no difficulty in making the proper discrimination by the board of education in respect to such monies.

Judgment should be given for the plaintiffs according to these views.

COURT OF APPEALS.

ROBERT MCKEE, plaintiff in error agt. **THE PEOPLE,** defendants in error.

Where it was objected to the charge of the judge on a trial for murder in the first degree, that he omitted to advise the jury that there was not sufficient evidence of premeditation to warrant a verdict of murder in the first degree:

Held, that it was a sufficient answer to this objection that no such request was made at the trial, and consequently no refusal and exception.

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The act of 1855, as amended in 1858, has no application to trials in courts of oyer and terminer. It is only when a conviction for a capital offense has taken place in the court of *general sessions of the peace* in and for the city and county of New York, that the court of appeals are authorized to grant a new trial, "whether any exception shall have been taken or not, to the court below."

Every thing which happened at the time of the homicide in the immediate presence and hearing of the prisoner, including the whole conversation which then occurred, is material evidence, as a part of the *res gestae*.

It is no error for the judge at a criminal trial, to refuse to strike out testimony which is wholly immaterial and irrelevant, and which could not under any theory have worked any prejudice to the prisoner.

The declaration and statements of the prisoner cannot be given in evidence, on his own behalf, for any purpose whatever

January Term, 1867.

At a court of oyer and terminer, held in the county of Livingston, in the month of February, 1863, the plaintiff in error was convicted of the crime of murder in the first degree, and was sentenced to be executed on the third day of April, then next ensuing.

The homicide was committed on the 18th day of November, 1861. On the 9th day of March, 1863, a writ of error was brought upon said judgment to the supreme court, and at a general term thereof, held on the 16th day of December, 1863, the judgment was affirmed, and on the 31st day of December, in the same year, the writ of error upon this latter judgment, was brought to this court.

The case was argued in this court at the January term thereof, held in 1865.

It was then held that the sentence passed upon the prisoner was clearly erroneous, and in conformity with the provision of the act of April 24th, 1863 (this court upon that occasion being of the opinion that the conviction of the prisoner had been legal and regular), directed the record to be remitted to the oyer and terminer, to pass the sentence prescribed by the act of 1860, (32 N. Y. R. 239.) Upon this argument no question was made that the trial and conviction of the prisoner had not in all respects been legal and regular. Nay, this court understood the learned counsel for the prisoner to concede upon that argument that it had been.

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At the September term of this court held in 1865, an application was made, on behalf of the plaintiff in error, to this court for a reargument, on the ground that errors had intervened on the trial prejudicial to the prisoner, and which, in the opinion of his counsel, were sufficient to procure a new trial, and which had not been urged on the former argument, for the reason that it was supposed the point relied on was fatal to the conviction, and would of itself, insure the discharge of the prisoner.

Under the peculiar circumstances presented, this court ordered a reargument, and the court have now heard all the suggestions of counsel deemed important, for the consideration of this court.

SCOTT LORD, *for plaintiff.*

J. H. MARTINDALE, *Attorney General, for defendants.*

DAVIES, Ch. J. We do not propose to review the questions discussed and decided upon the former argument. They are there carefully considered, and received the general approval of the members of the court. Those questions then passed upon must be regarded as finally settled, and not open to further discussion. (*Ratzky agt. The People*, 29 N. Y. 124.) There remain to be considered the points now made by the counsel for the prisoner, on this reargument, and urged as reasons why this conviction and judgment should be reversed. The homicide was perpetrated under circumstances evincing premeditation, and a determination to take the life of the deceased.

He was the brother-in-law of the prisoner, and had been at the prisoner's house at an early hour of the evening of the homicide, and had sought admittance to the prisoner's house, and had been refused. The deceased then went to the house of Mr. Meakly, the father-in law of himself and the prisoner, and soon after his arrival there, the wife of the prisoner came to the same house with her infant child. A short time after-

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wards the prisoner was heard outside the house, calling upon the deceased to come out, which he did, and immediately the report of a gun was heard, and the persons in the house going out, found the deceased had been shot, and was dead. The prisoner was there, and confessed he had shot him with his gun. Upon this state of facts, there would seem to be no question that human life had been taken under circumstances which the law characterizes as murder in the first degree. No question was made but that the prisoner had taken the life of the deceased, and the defense of insanity interposed, was fairly left to the jury, who, as the record states, "in a very few minutes returned to the court, and rendered a verdict finding the prisoner guilty of murder in the first degree."

It is now urged that it was error in the learned judge, at the trial, in not advising the jury that there was no sufficient evidence of premeditation to warrant a verdict of murder in the first degree. It is a sufficient answer to this objection to say that no such request was made at the trial, and, consequently, no refusal and exception.

The act of 1855 (*Laws of 1855, chap. 337*), as amended by chapter 330 of the laws of 1858, has no application to trials in courts of oyer and terminer. It is only when a conviction for a capital offense has taken place in the court of general sessions of the peace, in and for the city and county of New York, that this court is authorized to grant a new trial, "whether any exception shall have been taken or not, to the court below."

But we think the law was correctly expounded to the jury. The judge said: "In order to establish the guilt of the prisoner, two things are necessary: First, a corrupt intent, and second, a vicious will; that the fact of the killing Roger McWilliams, by the prisoner, is not denied, and cannot be. The case presumes that a person taking the life of another, with a deadly weapon, intends to do it; and if a sane man so intends, it makes no difference whether he had a motive or not, for it is not necessary to look for a motive, when a

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person has been so killed with a deadly weapon, or with poison; and if a man under the influence of passion or intoxication commits a crime, the law holds him responsible for it, though done in the heat of passion, and it is a question for you to determine whether the prisoner killed McWilliams with pre-meditation, or whether he acted in the heat of passion, without premeditation." The authority sustains the doctrine of this charge. (*The People* agt. *Clark*, 7 N. Y. 385; *The People* agt. *Rogers*, 18 *Id.* 9; *Willis* agt. *The People*, 32 *Id.* 715; *Freeman* agt. *The People*, 4 *Denio*, 9.)

We see no error in permitting the whole conversation which occurred at the time of the killing, in the presence and in the hearing of the prisoner, to be given in evidence to the jury. The witness had asked the prisoner if at the time he was in a passion? and he replied that he was. The prisoner's wife then manifestly in exculpation of the prisoner, and to account for his being in a passion according to his statement, said that the deceased had broken her windows, and she gave that as the cause of the difficulty, and she said it was done that evening. The evidence was clearly competent. It was a statement made in the presence and hearing of the prisoner, and his silence must be taken as an acquiescence in its truth. It was important, as tending to establish the anger and passion of the prisoner, and the motive operating upon him, in taking the life of the deceased.

It tended to rebut the testimony that the shot was accidental, and strengthened the position that it was *designed* and intentional. It was part of the *res gestæ*, and everything which happened in the immediate presence and hearing of the prisoner, at the time of the homicide, was material, and, therefore, admissible, as tending to show his motive for the act. It was correctly said by PARKER, Justice, in *The People* agt. *Greene* (1 *Parker's Cr. Rep.* 17), that "it was well settled that the maxim *qui tacet consentire videtur*, was applicable to verbal conversations, where there was a statement made in a party's presence, which was not denied by him.

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In such case the party had an opportunity to deny the statement at once, and not doing so, there was good reason for supposing he could not controvert it." The statement made by the prisoner's wife in his presence, of what she had told him, was clearly admissible. (*Jewett agt. Banning*, 21 N.Y. 27.)

Joseph Meakly, the father-in-law of the prisoner, was called to prove various acts and declarations of the prisoner, tending to show that the prisoner was insane. On his cross-examination, he testified, that upon an occasion mentioned, the prisoner came to the witnesses' house, and made threats of burning his house and shooting his man, if he, the witness, would not come out of the house. That the prisoner said: "Come out you old coward, I am a little boy." That the prisoner then kept still some time. The witness then remarked: "A week or two before this he had threatened to burn Bailey's barn. I told his wife I would have him taken up." On his re-direct examination, the witness testified: "Prisoner was not present when I had the conversation with his wife about the burning of the barn and taking him up; that he made no complaint of what I had said to his wife that night; he gave no reason why he was angry that night." The prisoner's counsel moved to strike out that part of the evidence relating to conversation between witness and the prisoner. The court denied the motion, and the prisoner excepted. The evidence objected to, consists in the statement of the witness, that in a conversation he had with the prisoner's wife, in reference to a threat of the prisoner to burn a barn, that he, the witness, would have him taken up. As it did not appear that this threatened action of the witness was ever communicated to the prisoner, or that he had any knowledge or intimation of it, it could never have had any influence upon anything the prisoner ever said or did.

It was wholly immaterial and irrelevant, and could not, under any theory, have worked any prejudice to the prisoner. From aught that appears, he was in entire ignorance that

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any such threat had ever been made, and no act of his could, therefore, have been based upon or affected by it. The silence of the prisoner on this subject, leads to the inference that his wife had never mentioned the contemplated action of the father to him. The judge might properly have directed the striking out of this testimony, but it was no error for him to refuse to do so.

For the reasons already stated, it was wholly immaterial.

The declaration and statements of the prisoner could not be given in evidence on his own behalf, for any purpose whatever. They certainly could not be to enable the witness to identify the prisoner, and were, therefore, properly excluded.

We see no error in what the learned judge said to the jury, in reference to the testimony of Dr. Bennett. He said to them : " If you find the prisoner, at the time Dr. Bennett was observing him through the hole in the wall, as described by the witness, was watching to see whether he was observed, and was regulating his conduct accordingly, it would raise a very strong presumption that the prisoner was feigning insanity, and intended such evidence of design and calculation on his part, as to be, in my opinion, entirely fatal to his defense of insanity."

A reference to Dr. Bennett's testimony will show the circumstances under which he watched the prisoner, and were important to determine whether the insanity imputed to the prisoner was feigned or real. The doctor said, he was looking through the hole, prepared so that he might observe the prisoner, and was looking through the hole when the prisoner was put into the west side of the jail. As soon as the sheriff closed the doors, the prisoner walked through the hall, going through the same motions as he had been before ; he then walked back towards the hole, and as he did so the witness noticed his eye directed towards the aperture ; it could be seen from the inside ; he did it two or three times ; he

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came near the aperture, passed to one side, and stood still a moment; he then crossed directly in front of the aperture to the other side—he then appeared to bend forward, and looked into the hole, and dodged back.

The conduct of the prisoner, as thus detailed, if he was watching to see whether he was observed, and was regulating his conduct accordingly, was most important for consideration of the jury, on the issue whether the insanity claimed for the prisoner was real or feigned. If the jury came to the conclusion that the prisoner was watching to see that he was observed, and believed that he was, then his conduct clearly evinced such evidence of calculation and design, as conclusively showed that he was not at that time at least insane. It certainly tended strongly to show that the defense of insanity was not founded upon fact, and the expression of the opinion of the judge, that it was fatal to the defense of insanity, is not a matter of exception. (*Cennee agt. Jackson*, 4 Peters, 1; *Foster agt. Steele*, 5 Scott, 28; *Belcher agt. Prithe*, 4 Moore & Scott, 295; *Gardner agt. Picket*, 19 Wend. 136; *Corn agt. Child*, 10 Pick. 252.)

We see no error in any of the rulings upon the trial, and if the appropriate sentence had been passed upon the prisoner, the judgment would be affirmed. But for the reasons heretofore given in this case, we reverse the judgment of the oyer and terminer, and of the supreme court, and in obedience to the mandate of the legislature, we remit the record, to the end that the appropriate sentence upon the conviction may be passed.

The judgment of the oyer and terminer, and of the supreme court, was accordingly reversed, and the conviction of the plaintiff in error, being in the opinion of the court legal and regular, is affirmed, and the record is remitted to the oyer and terminer of the county of Livingston, to the end that that court may sentence the prisoner to suffer death for the crime whereof he stands convicted, and that he be confined

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at hard labor in the state prison at Auburn, until such punishment of death shall be inflicted.

All concur except GROVER and SCRUGHAM, who were absent.
Reversed.

NEW YORK COMMON PLEAS.

OWEN MARRY agt. EDWARD D. JAMES and another.

An order extending time to answer, supersedes a prior motion noticed to strike out portions of the complaint, where there is no reservation in the order of the right to make such motion

Special Term, December, 1867.

MOTION to strike out portions of complaint as irrelevant and redundant.

I. T. WILLIAMS, for defendants, for motion.

F. H. BRYAN, for plaintiff, opposed

VAN VORST, J. After the service of the complaint, and before the time to answer expired, the defendants noticed a motion to strike out portions of the complaint, as irrelevant and redundant.

The defendants thereafter, and before the motion was brought on to be heard, obtained two extensions of twenty days each of time to answer, by orders of the court.

There was no reservation in either of the orders made by the judge, of the right to make the motion already noticed.

In *Boivin agt. Sheldon and others* (5 *Sands.* 657), it was held that the obtaining of an order extending the time to answer, would supersede a motion *already noticed*, to strike out portions of the complaint; that the order of extension operates as a bar to a future motion, unless by the terms of the order, the right to make the motion *already noticed*, is

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given. (*Vide also Garrison agt. Carr, 3 Abb. Rep. N. S. p. 266.*)

I concur in the propriety of the ruling in *Bowman agt. Sheldon*, and decide that it is too late for the party to make this motion, although it was noticed within the twenty days after the service of the complaint.

Motion denied, without costs.

SUPREME COURT.

LAWRENCE BURKE, respondent agt. THE BROADWAY AND SEVENTH AVENUE RAILROAD COMPANY, appellants.

In an action against a railroad company to recover damages for injuries arising from negligence, where from the evidence there is no doubt of the negligence of the party injured contributing to the injury, the plaintiff should be *non-suited*. And this rule applies to an action brought on behalf of a child six years of age, who sustains the injury.

"It was equally necessary for the plaintiff to establish the proposition that he *himself was without negligence and without fault*. This is a stern and unbending rule, which has been settled by a long series of adjudged cases, which we cannot overrule if we would." (*Per GRIDLEY, J. Spencer agt. Utica and Schenectady R. R. Co. 5 Barb. 337.*)

New York General Term, June 1857.

Before LEONARD, P. J., CLERKE and MILLER, Justices.

THIS was an action to recover of the defendants damages alleged to have been sustained by the plaintiff in the loss of service of his infant son, a lad of about six years of age, whose leg was run over by one of the defendants' cars in Thompson street, in the city of New York, on the 3d day of May 1865, by the alleged negligence of the defendants, their agents or servants, and so badly injured as to require amputation.

The pleadings form part of the judgment roll in this action, a copy of which are as follows:

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The plaintiff, by Miller, Peet & Nichols, his attorneys, complains against the defendants, and alleges:

First. That the defendants are a corporation, duly incorporated under the laws of the state of New York.

Second. That plaintiff is the father of Frank Burke, an infant, aged six years.

Third. That the defendants, by the fault and negligence of its servants, on the 3d day of May, 1865, in Thompson street, in the city of New York, ran one of its cars over said child of the plaintiff, and cut off and injured its leg, so that it had to be cut off.

Fourth. That said child and the plaintiff were guilty of no fault or negligence in the premises.

Fifth. That the plaintiff was put to great loss and damage thereby, and great expense for the treatment of his said child, and has lost the benefit and services of said child during his minority, to his damage in the sum of \$5,000.

Wherefore, the plaintiff demands judgment against the defendants for the sum of \$5,000, together with the costs of this action.

And the defendants for answer to the complaint in the above entitled action, respectfully show to this court:

First. The defendants admit that they are a corporation duly incorporated under the laws of the state of New York.

Second. The defendants have no knowledge or information sufficient to form a belief, as to whether the plaintiff is the father of Frank Burke, an infant, or as to what is the age of the said infant.

Third. And the defendants further answering, deny each and every other allegation contained in said complaint:

This action was commenced June 27th, 1865. Issue was joined August 14th, 1865. The cause came on for trial March 15th, 1866, before Justice MASON and a jury.

A verdict was rendered for the plaintiff for the sum of \$500, and an allowance of five per cent.

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ROBINSON & SCRIBNER, attorneys, and
JOHN M. SCRIBNER, JR., counsel for appellants

I. No principle of law is better settled than that in this class of cases, to entitle the plaintiff to recover, he must establish *affirmatively* the culpability of the defendant, and the want of any negligence on the part of the plaintiff. (*Button* agt. *Hudson River R. R. Co.* 18 N. Y. R. 248; *Deyo* agt. *N. Y. Central R. R. Co.* 34 *Id.* 9.)

An action for negligence cannot be maintained, if the wrongful act or negligence of the plaintiff *co-operated* with the misconduct of the defendant to produce the injury complained of. (*Munger* agt. *Tonawanda R. R. Co.* 5 Denio, 255; *Same case affirmed*, 4 Comst. 349; *Wilds* agt. *Hudson River R. R. Co.* 24 N. Y. 430.)

In the latter case, the rule laid down by the court is, that the party injured must have been entirely free from any degree of negligence contributing to the injury; and that to *carry a case to the jury*, the evidence on the part of the plaintiff must be such, as if believed, would authorize them to find that the injury was occasioned *solely* by the negligence of the defendant.

The same doctrine has been affirmed again and again in the courts, and cases innumerable might be cited to sustain it. (*Johnson* agt. *Hudson River R. R. Co.* 20 N. Y. 65; *Steves* agt. *Oswego and Syracuse R. R. Co.* 18 *Id.* 422; *Mangam* agt. *Brooklyn City R. R. Co.* 36 Barb. 230; *Suydam* agt. *Grand Street R. R. Co.* 41 *Id.* 375; *Wilds* agt. *Hudson River R. R. Co.* 29 N. Y. 315.

Judge GRIDLEY declared this to be "a stern unbending rule of law, which has been settled by a long series of adjudged cases, and which we cannot overrule if we would." (*Spencer* agt. *Utica and Schenectady R. R. Co.* 5 Barb. 337; *Deyo* agt. *N. Y. Central R. R. Co.* 34 N. Y. 14.)

II. Applying this rule to the circumstances of this case, the plaintiff was clearly not entitled to recover, and the

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motion made by defendants' counsel to dismiss the complaint when the plaintiff rested, should have been granted. The child's own negligence, and that of his parents, was fully established by the very evidence introduced to maintain the plaintiff's cause of action.

1. The child was proven to have been, at the date of the accident, less than six years of age, and yet was allowed to go at play unattended *in the public streets*, and that too, in a locality where railroad cars were constantly passing. At the time he received his injuries, the plaintiff's witnesses locate the boy at play upon a dirt heap extending from the sidewalk nearly to the railroad track. The plaintiff proved the distance from the sidewalk to the railroad track, to be *five feet nine inches*, which annihilates the statement of the witness Webber, that he was stooping from the sidewalk. A lad of six years would require to be the child of a giant, to have incurred his injury in that way, and this child was of small stature for his years.

2. Ella Clayton, one of plaintiff's witnesses, says: "The car was coming up pretty fast. * * * Franky was on the dirt in front of house No. 174 Thompson street. He was playing on the dirt heap. He had something in his hand, and *just as the car came up* he let it fall, and the car struck him in the forehead, and he went right under the car. I guess Franky had been on the pile of dirt about fifteen minutes when the car came along."

3. Witness Logan says: "I took notice of the child upon a heap of dirt, when the car came along very rapidly. * * * The boy was fifteen or eighteen yards ahead of me, and stooping down upon a heap of dirt. The car was coming very fast down Thompson street."

4. Frank Burke, the child injured, gives his statement: "*I was lying there on my back on this heap of dirt*, with my back to the dirt, looking over to get it (the wheel he had lost). *I was lying down upon the heap of dirt*, and then I tried to pull my leg out, but I could'n't. * * * I did not

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find my wheel, or see it at all. I could'nt, it was over on the heap of dirt. I saw the wheel before the car hit me, and went in to get it, and I was doing like this, getting up, when the car ran over me. I had got hold of the wheel when the car was on top of me."

The dirt heap was midway between the track and the sidewalk. At folio 86, he says: "When it got into the heap of dirt *I ran after it quick*, and when I was trying to pick it up the car run over me."

Adopting the description given of the accident by any one or all of the plaintiff's witnesses, it was a clear case for a non-suit, in accordance with the law governing the questions in issue.

"No matter how gross or evident the negligence of the driver of a vehicle, if another by his own negligence exposes himself to injury from the vehicle, he has no remedy." (*Mangam* agt. *Brooklyn City R. R. Co.* 36 Barb. 236; *Spooner* agt. *Same defendants*, 31 Id. 419.)

A plaintiff suing for negligence must be himself without fault, and the law makes no distinction in consequence of the tender age of the person injured, but holds all, of whatever age, to the same degree of care and foresight. (*Hartfield* agt. *Roper*, 21 Wend. 615; *Brown* agt. *Maxwell*, 6 Hill, 592; *Kreig* agt. *Wells*, 1 E. D. Smith, 74; *Abbott* agt. *Macfie*, 33 L. J. Ex. 177; *Honigsberger* agt. *Second Avenue R. R. Co.* 33 How. Pr. 193; reversing decision in same case, 1 *Daly*, 89.)

The present action was a stronger case for a non-suit than the case of *Hartfield* agt. *Roper*. In that case, the child, though younger, was sitting in a country road little traveled, while if the boy Frank Burke, tells the truth, *he was lying on his back* in one of the public streets and crowded thoroughfares of a great and busy city, and through which the defendants' cars and other vehicles lawfully using the street, are constantly passing and repassing. A child having no more discretion than to place himself in such exposed and dangerous position, in face of a railroad car approaching in

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full sight and at rapid pace (as the plaintiff's witnesses state), was improperly allowed by his parents to be at large in the street unattended.

"An infant is not *sui juris*, he belongs to another, to whom discretion in the care of his person is exclusively confided. That person is keeper and agent for this purpose, and in respect to third persons his act must be deemed the act of the infant; his neglect the infant's neglect." (*Hartfield agt. Roper, supra*; *Waite agt. Northeastern R. R. Co. E. B. & E.* 719.)

WOODRUFF, J., in *Kreig agt. Wells (supra)*, says: "It cannot be tolerated that in a crowded city like this, parents should suffer their infant children to play unattended in the streets, and for injuries occasioned by their indiscretion, hold others responsible, engaged in the pursuit of their lawful business, without proving the latter guilty of any negligence whatever." (1 *E. D. Smith*, 77.)

III. We have thus far considered only the facts as developed by the evidence introduced on behalf of the plaintiff. An examination of the testimony produced on the part of the defendants, will show that there was clearly nothing in the case to be submitted to the jury.

1. Mr. Golding testified: "I was driving at an unusually slow gait; there was no car in sight behind me, and I was driving at little better than a walk. The boy ran out to catch hold of the car, and the driver warned him off. The car was stopped within six or eight feet." There is an important fact in this connection (disputed only by the witness Webber, who, as we claim, was utterly unworthy of credit, and directly impeached), that the boy was picked up *under the hind step of the car*. This fact was sworn to distinctly by three witnesses, and proves conclusively that the car could not have been going fast. The conductor swears the speed of the car was about four miles per hour, and this was uncontradicted. The witness Webber, did not see the child run over, for she says: "I put my hands up to my eyes. * *

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I did not see when the child was picked up." Her whole story is a mass of contradictions.

2. Golding was fully corroborated by the conductor, and by the lad Gilhooley. This boy did not see Mrs. Webber; the conductor did not see her; Frank Burke did not see her; and *the conclusion is irresistible* that Gilhooley spoke the truth when he told plaintiff's counsel "*she was not there at all.*"

3. The witness Webber, was successfully impeached. Her attack upon the character of the driver was unexpected, but she met it. She says, "he smelted of rum, as if he had been drinking; I smelted liquor on the man, and I saw him stagger." She makes this still stronger on her cross-examination: "I could not say he was very much intoxicaied, but he smelted *awful* of brandy or liquor of some sort; he was drunk enough to affect his walk, and he smelt of brandy; I could not say it made any impediment in his speech, *but still anybody would see and know he was intoxicated*; I am not as positive that he was drunk as that I saw the boy hurt this day, but I know there was liquor on him; I know that he had been drinking, and I know that he staggered, *those things I do know.*"

This was evidence of great importance, material to the point in issue—the negligence of the defendants. If untrue, her statement cannot be allowed the charitable inference of mistake, but must be pronounced *wilfully false*, and its untruth was proved beyond a peradventure.

1. Golding swears that *twenty-seven years ago* he took Father Matthew's pledge *on oath*, and never since has tasted wine or liquor.

2. Brown, the conductor, says: "I had known Mr. Golding then between three and four months; he was as sober a man on that day as I am now at the present moment; he had never, during my acquaintance with him, taken a glass of liquor that I saw."

3. O'Callahan says: "I have known Patrick Golding a number of years, and have been intimate with him; I have

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never seen him under the influence of liquor; I have always seen him sober, and I have seen him a good deal."

4. McGuire says: "I have known Golding, I should say, twenty months, and have been where I could see him *daily* a portion of that time; I have never seen him under the influence of liquor in my life."

5. Samuel Parsons, the policeman, called in at Golding's request, says: "I saw the driver on that day; he was perfectly sober."

We ask the court to apply to Mrs. Webber the familiar maxim, *falsus in uno, falsus in omnibus*, and to discredit her testimony altogether. (*Forsyth agt. Clark*, 3 Wend. 643.)

IV. The court erred in refusing to allow the question, "Suppose a child of the size of the plaintiff's son was standing upon the sidewalk and leaning over to pick up something, could the car have possibly hit him?" The witness was the conductor, who knew the locality and the distance from the car to the sidewalk, and, having seen the child both at the time of the accident and in court at the trial, he was competent to speak on the subject. The question called for a fact, not for an opinion of the witness.

V. The court erred in refusing defendants' offer to send for and prove by their time book that, at the time the driver was sworn by witnesses Webber & Hestie to have been at Mrs. Webber's house, he was actually on duty as driver of one of their cars. The book contained original entries, made in the usual course of business, and, duly authenticated, would have been competent evidence to prove the fact stated, and would of itself have effectually disposed of Webber and Hestie. (*Merrill agt. Ithaca and Owego Railroad Co.* 16 Wend. 586; *Bank of Monroe agt. Culver*, 2 Hill, 531.)

VI. The propriety of a non-suit in an action of this character, where the plaintiff's proofs are insufficient to sustain a cause of action, is very manifest.

BARCULO, J., in *Harring agt. New York and Erie Railroad Co.*, says "We cannot shut our eyes to the fact that in

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certain controversies between the weak and the strong, between an humble individual and a gigantic corporation, the sympathies of the human mind naturally, honestly and generously run to the assistance and support of the feeble and apparently oppressed, and that compassion will sometimes exercise over the deliberations of a jury an influence which, however honorable to them as philanthropists, is wholly inconsistent with the principles of law and the ends of justice. There is, therefore, a manifest propriety in withdrawing from the consideration of the jury those cases in which the plaintiff fails to show a right of recovery." (*Harring* agt. *N. Y. and Erie Railroad Co.* 13 Barb. 15; *Suydam* agt. *Grand Street Railroad Co.* 41 Barb., 380.)

VII. The power and duty of the court to reverse a judgment, where the verdict is against the evidence, or against the weight of the evidence, is determined in the following, among other cases: *Sheldon* agt. *Hudson River Railroad Co.* 29 Barb. 226; *Thompson* agt. *Menck*, 22 How. Pr. 431; *Heritage* agt. *Hall*, 33 Barb., 347; *Wilds* agt. *Hudson River Railroad Co.* 24 N. Y. 430; *Macy* agt. *Wheeler*, 30 N. Y. 231.)

The appellants seek to have this judgment reversed, and request the court to regard it in the language of SMITH, J., in *Mackey* agt. *New York Central Railroad Co.* (27 Barb. 541), as "directly against the evidence, and we cannot uphold it, or refuse to set it aside, unless we adopt the rule which is, I fear, quite prevalent in the jury box, that the same measure of justice is not to be meted out to a railroad corporation that is meted out to natural persons."

The order and judgment appealed from should be reversed and a new trial granted, with costs to abide event.

MILLER, PEET & NICHOLS, attorneys, and
LIVINSTON K. MILLER, counsel for defendant.

I. Defendant's case presents four exceptions:
(a.) To denial of motion to dismiss complaint.

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- (b.) To a question, at folio 74
- (c.) To the refusal of the court, after the evidence had closed, to allow defendants to send some miles for the drivers' book, in order thereby to contradict plaintiff's witnesses.
- (d.) To the denial of his renewed motion to dismiss.

We submit that the first exception is not well taken; for in all cases of conflicting evidence as to negligence, the jury are the proper judges of the facts. (*Drew agt. Sixth Avenue Railroad, 26 N. Y. 49; Ernst agt. Hudson River Railroad, 32 How. Pr. R. p. 61, p. 88.*)

The question at folio 74 was properly rejected, because it called for witnesses' opinions and not for facts. (See *Keller agt. N.Y. Central Railroad Co. 24 How. Pr. R. 184; Cook agt. Broadway, 21 Barb. 331; Morehouse agt. Matthews, 2 Comstock, 514.*)

He was immediately allowed to testify as to what was the distance, so that the jury could judge of the facts.

The third exception was as to what was entirely a matter of discretion, and cannot be sustained.

The fourth and first exceptions are the same.

• II. The jury having found a verdict, after a charge which, not having been inserted in the case, or excepted to by them, must be considered to have been most favorable to defendants, the court will not disturb the verdict.

III. The judgment should be affirmed, with costs.

By the court, LEONARD, P. J. An infant, when suing on his own behalf, for injuries to his person, arising from the negligence of others, must be free from the imputation of negligence on his part, tending to produce the damages sought to be recovered. The rule is the same, whether the action be by an infant or an adult. We would not hesitate to hold an adult person who should rush from the sidewalk, when a street rail car was passing near (within four feet of the curbstone, when the proper allowance is made for the projection of the car body beyond the railroad track), and lying down upon a

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heap of sand placed in the narrow space between the track and curbstone, seeking to recover an article which had fallen from his hand, upon such narrow space, to be guilty of inexcusable negligence.

In reckless and childish haste, the infant approached so near the car as to bump his head against it. It is no excuse that he did not see the car. It appears to be negligence not to have done so; ordinary prudence would have prevented. Nor is it any excuse that he had less discretion than a man.

He is required to exercise the prudence of a person of ordinary intelligence, before an action for damages arises for an injury to his person, resulting partly from the carelessness of others. The lad was required to take the same care of himself as any other person. All are held accountable for a reasonable degree of prudence as to their own safety. That reasonable care is the same, whether the rule be applied to a simpleton or a wise man. An injury received, without reasonable prudence on the part of the person injured, gives no right to recover amends in pecuniary damages.

The father can recover only under the same circumstances of prudence as would be required if the action were on behalf of the boy.

The negligence of the driver was, it is clear, a question for the jury, and it was properly submitted.

The motion to dismiss the complaint should have been sustained upon the other ground.

The call of Mrs. Webber was a warning to the child as well as to the driver of the car. It is difficult to understand, from the evidence, that the driver could have managed the car so as to have prevented the accident; but I lay no weight upon this question, and am of opinion, under the decision of the case of *Ernst agt. The Hudson River Railroad Company*, that the case on this point should have been left to the jury, had it not been beyond doubt that the negligence of the boy contributed to produce the injury.

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The judgment should be reversed and a new trial granted, with costs to abide the event.

CLERKE, J. concurring.

MILLER, J., dissenting.

COURT OF APPEALS.

ANN CURRAN, administratrix, &c., appellant agt. THE WARREN CHEMICAL and MANUFACTURING COMPANY, respondents.

Where, in an action brought by an administrator under the statute of 1847, &c., for wrongful act, neglect or default, in causing death, it is established by undisputed facts that the deceased, by his own carelessness, negligent and wrongful act, contributed to the cause which produced his death, the plaintiff should be nonsuited. (*Per BOCKES, J.*) (*This agrees with the next preceding case of Burks agt. The Broadway and Seventh Avenue Railroad Company.*)

The mere fact that an injury or death on the premises of a party, in his possession and under his control, raises no presumption of wrong against such party. The circumstances under which the injury occurred must still be proved, showing a wrongful act or omission of duty on the part of the person sought to be charged, in order to establish a liability.

The burden of proof in all cases of negligence is on the plaintiff.

January Term, 1867.

This action was brought by the plaintiff as administratrix, under the act of 1847, and its amendments, which gives compensation in case of the death of a person occasioned "by wrongful act, neglect or default."

JOHN HAYES, for appellant.

GEORGE DOUGLAS, for respondents.

BOCKES, J. The defendants, a manufacturing company, were engaged in the distillation of coal tar, and in the manufacture of chemical oils, as benzole, benzine and naptha.

The deceased, a son of the plaintiff, was a boiler maker in the employ of a firm engaged in the construction and reparation of boilers, and was sent by his employers to the defend-

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ants' manufactory to repair their boiler. To prosecute the work it was necessary to labor on the inner surface, by the light of lamps, entering through an orifice opened for the purpose.

On the day of the disaster, the deceased labored, as he had done for several days previous, until twelve o'clock, then went to his dinner, from which he returned in about a half hour, entered the boiler, and fell dead almost instantly, in consequence of inhaling foul and poisonous gas, which had accumulated during his absence. It does not distinctly appear where and how the foul gas had its origin. On this point the parties supported different theories from the evidence. On the part of the plaintiff it was insisted that it was generated in the adjoining still, the entire works comprising six, and escaped into the boiler where the deceased labored, through some imperfection in the works, or by reason of inattention and want of care in the defendants' agents and servants, in permitting this result.

On the part of the defendants, it was maintained that the gas was generated in the boiler itself, by reason of the combustion of the lamp, and the respiration of the laborers therein, and further, that wherever it had its origin, the deceased himself contributed to the danger and actually caused the catastrophe, by closing or directing the closing of the ventilator attached to the boiler, and which operated as a safety valve for the escape of noxious gases.

There was no dispute but that there was such ventilator, and that safety to the laborers within the boiler required it to be generally, if not at all times open, while the work was progressing; nor is there any dispute but that the deceased, in the forenoon of the day of the disaster, directed and caused it to be closed.

In this view of the case, and in my judgment none other can fairly be taken, the learned justice should have nonsuited the plaintiff at the close of the evidence, as he was requested to do; for, on the conceded and disputed facts, it

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stood established that the deceased, by his own careless, negligent and wrongful act, contributed to the cause which produced his death. It seems plain beyond peradventure that the closing of the ventilator prevented in a very great degree the escape and diffusion of the noxious vapor, and caused it to accumulate; and its unusual collection and concentration thus produced was the immediate cause of the injury complained of.

But if it be admitted that a case was made for the consideration of the jury, then it was submitted to them in one respect upon a wrong theory. The general tone of the charge was undoubtedly correct. The jury were instructed that they were to consider the ordinary hazards and risks of the employment, whatever they were, as having been voluntarily assumed by the deceased; that when a man engages in a dangerous enterprise, he accepts its ordinary risks, and is bound to foresee and submit to the consequences which usually attend it. They were also correctly instructed, that in order to recover, the plaintiff was bound to show that the deceased came to his death without fault on his part, and through the negligence, carelessness or wrongful act of the defendants, their agents or servants. But they were also told that, under the facts proved in this case, the defendants must explain how this man came to his death; that, since the plaintiff had shown that the deceased was killed on the defendants' premises, in their factory, under their exclusive control, that the burden of proof was cast upon the defendants to explain how that death came, and that they must satisfy them (the jury) that it was caused without any fault on their part, or be responsible in damages. It was also charged that, inasmuch as the death occurred on the defendants' place, where they were in the exclusive occupation and control of it, as matter of law the defendants were liable, unless they could explain the cause; that, when a man has been killed or has died on the premises of a party charged with a wrong in that regard, without assignable reason for it that can be seen, such person

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is bound, in order to discharge himself from liability, to show that he is not to blame for such death; and again the judge remarked, "now upon that question," (the question how deceased came to his death) "the burden of proof, as I have told you, is with the defendants, to show how this man came to his death, *because it took place on their premises;*" and it is added, "it is not necessary, as I can see, for the plaintiff to show you the precise manner or theory of his death." There are other paragraphs in the charge of similar import. These instructions were obviously erroneous. The mere fact that an injury or death on the premises of a party, in his possession and under his control, raises no presumption of wrong against such party. The circumstances under which the injury occurred must still be proved, showing a wrongful act or omission of some duty on the part of the person sought to be charged, in order to establish a liability. The simple happening of an injury on one's premises raises no presumption of wrong on his part, any more than would the happening of an injury in his presence or under his observation. The burden of proof in all cases of negligence is on the plaintiff.

It was held in *Holbrook and wife agt. The Utica and Schenectady R. R. Co.* (12 N. Y. 236), that when a passenger on a road is injured, the burden of proving that the injury was caused by the negligence of the company or its servants, rests upon the party seeking to recover damages therefor, and that the mere fact that a person is injured while riding in a railroad car does not impose upon the company the burden of disproving negligence. Judge RUGGLES properly remarks, the presumption arises from *the cause* of the injury, or from other circumstances attending it, and not from the injury itself. So, in the case under examination, if indeed it was a proper one for them, the jury should have been directed to examine into the cause of the death, with a view determining the defendants' liability, instead of starting with a presumption of wrong, from the fact that the deceased died

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on the defendants' premises. The charge of the judge was manifestly wrong in a very essential particular. It cast the burden of proof where it did not belong, and permitted the jury to hold the defendants to a liability not warranted by the facts on which it was supposed to rest.

The order of the general term, reversing the judgment and granting a new trial, was clearly right, and should be affirmed. The defendants are also entitled to judgment absolute in their favor, according to the stipulation.

DAVIES, HUNT, SCHRUGHAM, PARKER and GROVER concurred in the conclusion arrived at, on the last point discussed in the opinion.

PORTER, J., was for reversal.

WRIGHT, J., expressed no opinion.

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COURT OF APPEALS.

ABRAHAM X. PARKER, trustee, appellant agt. BENJAMIN F. JERVIS and others, respondents.

Upon appeal, where the trial is had before a jury, there is no power in this court, nor in the general term below, to review questions of fact.

If there is evidence competent upon the questions submitted to the jury, and sufficient to authorize their verdict, it is not open to re-examination in the court above. The finding of the jury is conclusive.

Held, that the evidence in this case showed a fair case of a delivery of the goods, and a continued change of possession, under the assignment made for the benefit of creditors, which justified the verdict of the jury.

January Term, 1867.

THIS is an appeal by the plaintiff, from an order of the supreme court, made at general term, in the fourth district, reversing a judgment in favor of the plaintiff, rendered on the verdict of a jury, and ordering a new trial. The facts are stated in the opinion of the court.

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JOHN H. REYNOLDS, *for Appellant.*

CHARLES TRACY, *for respondents.*

HUNT, J. This action was brought to recover damages for the taking, by defendants, of certain personal property assigned by one George H. Goodridge to Wm. C. Chipman, for the benefit of creditors. The action was brought in the name of Chipman as plaintiff, and Chipman having died pending the proceedings, the plaintiff has been substituted as trustee and plaintiff in his stead. The defendants justified the seizure as judgment creditors of Goodridge, claiming that the assignment was fraudulent and void, and that the property belonged to him. After the evidence was all introduced, the defendants moved for a nonsuit, on the ground that there had been no actual delivery or change of possession of the assigned property. The court refused the motion, and the jury found a verdict for the plaintiff. The defendants moved for a new trial at the special term, which was denied. Upon appeal to the general term, it was held, that the plaintiff should have been nonsuited, and for that reason the judgment was reversed and a new trial ordered. From this judgment of reversal the plaintiff appeals to this court, stipulating that, if the order of the general term be affirmed, judgment absolute shall be rendered against him.

It will be observed that the present was the case of a jury trial, and the proceedings upon the motion for a new trial are regulated by sections 264 and 265 of the Code. The proceedings, when the trial is had by the court, are regulated by section 268; and when a trial is had before a referee, the appeal is regulated by section 272 of the Code. In each of the latter cases, viz., when the trial is had by the court, or when it is had before a referee, this court is authorized to review the questions of fact existing in the case, if it is certified in the order of reversal that the judgment was reversed on questions of fact. Upon appeal, where the trial was had before a jury, there is no power in this court, in any event,

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to review the questions of fact, nor do I find any such power existing in the general term. In the classes of trials before a referee, and before the court, power is expressly given to the general term, by the sections quoted, to review the questions of fact; but when the trial is before a jury, no such power is given, and none exists. If there is evidence competent upon the questions submitted, and sufficient to authorize their verdict, it is not open to re-examination in the court above. The finding of the jury is conclusive.

In the present case the court below has not undertaken to review the finding of the jury upon the facts, in form, but, after giving its idea of the evidence and its effect, say, "these indications, added to the presumption which the statute implies, were sufficient to take the case from the jury, and it should have been so taken away," and thereupon the judgment was reversed and a new trial granted. I am obliged to differ from these conclusions, and am of the opinion that a fair case was presented for the judgment of the jury. What is the practice of this court in such a case? In *Sanford agt. Eighth Ave. R. R. Co.* (23 N. Y. 243), Judge Comstock lays down the rule in these words: "When the trial is by jury, we have no power, under the existing rules of law, to review any question of fact determined in the subordinate courts. In this case, therefore, we should be obliged to affirm the order granting a new trial, if that order could stand consistently with any view to be taken of the evidence given at the trial. But we are of opinion that, after giving the defendant the benefit of whatever conflict there may be in the testimony, after examining the facts proved in the light most favorable to him, the plaintiff was entitled to a verdict." The result arrived at in that case was the proper one, and the case was rightly decided. The principle announced I think was erroneous. It was not the duty of this court "to affirm the order granting a new trial, if that order could stand consistently with any view of the evidence." Neither this court, nor the general term, had any right to review the

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facts. But a single question could arise before the general term, and that was whether there was any evidence upon which the finding of the jury could be sustained. The weight of evidence, the criticisms upon it, and the inference to be drawn from it, were for the jury exclusively. If the case admitted of different "views," the judgment of the jury was conclusive. So in the present case, if the general term are to be understood as reviewing the facts, and overriding the judgment of the jury, they exceeded their jurisdiction, and their judgment cannot be sustained. If they intended to decide that there was no proof by which the assignment could be maintained, that giving full effect and credence to the plaintiff's testimony, it did not sustain his claim, then a question of law was presented, properly passed upon by them, and properly to be considered here.

I will examine this question. The objection was that there was not an immediate delivery of the goods, and an actual and continued change of possession. The assignment was made to Chipman, a creditor, living in the immediate vicinity. It was made in the afternoon, in an upper chamber of the store building, in the presence of witnesses. At the time of executing the assignment, the assignor delivered to the assignee the keys of the store, for the purpose of giving him dominion over the property. The former clerks were discharged by the assignor, and were again employed by the assignee to take charge of and remain with the goods for the assignee. They did so take charge and hold the goods for the assignee, and in their actual possession. The assignee at the same time took the books, the notes and accounts from the store to his office. The signs were taken down, and there is no evidence that the assignor, after this period, ever had or exercised any dominion or control over any of the goods, or that he was ever in or at the store where the goods were kept. The New York creditors were informed, within a few days, by the assignee in person, that an assignment had been made. This evidence shows a fair case of a

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delivery of the goods, and a continued change of possession under the assignment.

It cannot be denied, and need not be, that the conduct of the assignor and of the assignee, when in New York, immediately after the assignment, was open to criticism. Conflicting statements, however, were made, and, as detailed by the assignee, the transactions were much less objectionable than as detailed in the evidence of the creditors. It was for the jury to say which statement they would rely upon, and it was for the jury to say whether they credited the plaintiff's evidence, to which I have before referred. By their verdict they affirmed that they did credit it. The defendants then claimed, as they claim now, that the assignment was void:

1. Because of the want of delivery, and continued change of possession;
2. For actual fraud in the purpose and intent of the assignment.

There was evidence sufficient to justify the jury in finding a delivery and change of possession, and in finding that there was no fraud. Having so found, we cannot interfere.

If any valid exception had been taken by the defendants on the trial, the judgment of reversal could be sustained on that ground. None such is referred to by the defendants' counsel in their points; and in examining the case, I find but a single exception to verdict on their part, and that is without merit.

Order for new trial should be reversed, and judgment upon the verdict affirmed.

All the judges concur in the above except Judge GROVER.
Judgment accordingly.

In the Matter of James K. Place.

NEW YORK COMMON PLEAS.

IN THE MATTER OF JAMES K. PLACE.

On *habeas corpus*, the judge before whom it is returnable will not review the decision of the judge of another court made upon full argument, that the warrant upon which the defendant was arrested was properly issued and the defendant was legally held, where the same objections to the warrant and arrest are relied on upon the *habeas corpus*. The remedy of the defendant in such case is by *certiorari*.

At Chambers, December 23, 1867.

PROCEEDINGS on the return of writ of *habeas corpus*.

MARSH, COB & WALLIS, for petitioner.

FOSTER & THOMPSON and EDWARDS PIERREPOINT,
opposed.

VAN VORST, J. The person imprisoned was brought before me in pursuance of a writ of *habeas corpus* directed to John Kelly, sheriff of the city and county of New York. The sheriff returned to the writ that he had arrested the party and taken and held him in his custody, by virtue of a warrant to him issued, and which he produced and made a part of his return. The warrant was issued by the Hon. GEORGE G. BARNARD, one of the justices of the supreme court, under the provisions of the act entitled "An act to abolish imprisonment for debt, and to punish fraudulent debtors," passed April 26, 1831. The prisoner traversed the return to the writ, and alleged in answer that the warrant was illegally issued, and without jurisdiction on the part of the officer who granted the same; and particularly that the action was not one in which the defendant could be arrested, according to the provisions of the act; that there was not sufficient proof by affidavit before the judge to justify the issuing of the warrant, and that the defendant had been pre-

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viously arrested in the action by order made in pursuance of the provisions of the Code of Procedure.

It appeared before me on the argument of the matter, on the return, and traverse to the writ of *habeas corpus*, that all these objections were taken and argued before, and were considered by the justice of the supreme court who issued the warrant; and that the justice had decided that the objections were not well taken, and that the warrant was properly issued and the party legally held. That after such decision, the party imprisoned controverted the facts and allegations upon which the warrant issued, in pursuance of the seventh section of the act; that the proceeding was pending before the justice, and the party under examination when the *habeas corpus* was issued and served.

I am satisfied that, under such a state of facts, I ought not to re-examine upon *habeas corpus* the objections raised and discussed before and decided by the justice who issued the warrant, and that I should express no opinion on the subject of the legality of the arrest. Should I do so, it would amount substantially to a review of the decision of the judge, which I am persuaded should not be accomplished in this way.

The party imprisoned is not without remedy, if there be error in the decision and proceedings before the officer who issued the warrant. The determination of the judge may be reviewed by a writ of *certiorari*, which will take up all the proceedings for examination.

The prisoner is remanded.

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SUPREME COURT.

THE TOWN OF GRAVESED, plaintiffs agt. CYRUS CURTISS, WILLIAM C. ANDERSON and JAMES R. ALLABEN, Commissioners of Quarantine.

The commissioners of quarantine will be restrained by injunction from taking, carrying on or continuing any proceedings, to acquire title to a tract of land selected by them as a site for a landing and boarding station, and from taking possession thereof, where the facts in the case are such as to justify and sustain the inference that the large tract of land was not *bona fide* selected only as a site for a landing and boarding station, but with a view to other purposes.

Second District General Term, September, 1867.

Before LOTT, BARNARD and GILBERT, Justices.

APPEAL from an order dissolving an injunction. An injunction order was granted in this action, *at special term*, on the 29th July last, upon the complaint and affidavits, with liberty to the defendants to move at the August special term, on two days' notice to the plaintiffs, to dissolve the injunction. At the August special term, upon the complaint and affidavits, and the answer and affidavits, after full argument, the injunction was dissolved, on the ground that the proper parties defendants were not included in the action; that the metropolitan board of health, and the mayors of New York and Brooklyn, who, with the defendants commissioners of quarantine, or a majority of them, constituted the board who were authorized to select the location for quarantine site for landing and boarding station, on the west end of Coney Island. From this order dissolving the injunction the plaintiffs appealed to the general term. The complaint and answer, each supported by affidavits, will sufficiently show the grounds upon which the injunction is sought.

COMPLAINT—County of Kings, ss:

The town of Gravesend, plaintiffs, by way of complaint

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against Cyrus Curtiss, William C. Anderson and James R. Allaben, the commissioners of quarantine, show:

That the plaintiffs are the owners in fee simple of Coney Island, which is situated in the county of Kings, and within the town of Gravesend.

That the legislature of the state of New York, by an act passed on the 22d day of April, 1867, did enact, that the commissioners of quarantine, the metropolitan board of health, and the mayors of the cities of New York and Brooklyn, were thereby authorized and directed as soon as practicable after the passage of said act, to select a suitable site on Barren Island to erect a temporary structure, if it should become necessary, until a suitable permanent structure shall be erected on West Bank (which the said board were there-directed to construct as soon as practicable), with all the necessary appurtenances for the reception and temporary detention of passengers under quarantine who have been exposed to contagious or infectious diseases, but who are not actually sick, and who may be sent there by the health officer pursuant to law; and it was thereby further enacted as follows:

"They shall also select a suitable site for a landing and boarding station on the west end of Coney Island, to be used in place of the one specified in the twelfth section of chapter 751 of the laws of 1866. Said sites shall be selected as near to each other as the safety of the public health and the convenient discharge of the duties of the health officer will permit. As soon as said sites, or either of them, shall be determined upon by said commissioners, the metropolitan board of health and the mayors of said cities, or a majority of them, they shall certify that fact in writing to the governor, lieutenant-governor and comptroller; and if the site or sites so selected shall be approved by them, or a majority of them, they or such majority shall make and sign a certificate of the fact, specifying particularly therein the site or sites so selected, and file the same in the office of the secretary of

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state; and thereupon the said commissioners shall become and be deemed to be empowered to acquire title to the lands specified in said certificate, and fit up the same for quarantine purposes, as thereafter specified."

And it was also thereby provided, that as soon as a site or sites shall have been selected and determined upon in the manner thereinbefore provided, if they shall be unable to acquire title thereto in behalf of the people of the state by purchase, at a price which shall be approved by the governor, they may acquire title thereto in behalf of the said people, in the same manner and by the same proceedings as are prescribed for acquiring title to lands by railroad corporations, in and by the provisions of chapter 140 of the laws of 1850, and the acts amendatory thereof.

And the plaintiffs further show, that, in pursuance of said act, the commissioners of quarantine, the metropolitan board of health, and the mayors of the cities of New York and Brooklyn, duly selected, as the defendants claim, as the site for a landing and boarding station on Coney Island, a tract of land upon said Coney Island by the following description: All that part of Coney Island, in the county of Kings, which lies westerly of a line drawn from the southwest corner of the house erected at Bath, on the shore of Long Island, owned or occupied by C. Godfrey Gunther, across Gravesend bay and said island, in a due southerly course, until it reaches the Atlantic ocean.

And that the defendants are proceeding to acquire title thereto by legal proceedings, and have given notice of the presentation of a petition before the supreme court, at the city of New York, for the appointment of commissioners to appraise the compensation for the same.

And plaintiffs further show, that the land so designated and sought to be taken as a site for a landing and boarding station is a very large tract of land, containing about 300 acres above high water mark, with a water front of nearly

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three miles, and including the land between high and low water mark, probably 600 acres.

That it grossly exceeds in quantity what is necessary for the legitimate purposes of a landing and boarding station.

That a landing and boarding station, within the intent and meaning of the law, is only a place for the location of the health officer and his subordinates from which to go to board vessels arriving at the port of New York, and that five acres square of upland, with the water front adjacent to it, would be amply sufficient for the purpose, and afford every convenience.

That the whole quarantine ground on Staten Island consists of about twenty-five acres, and that the ground reserved from that tract for the purposes of a landing and boarding station, by section 12 of chapter 751 of the laws of 1866, contains, by estimate from the commissioners' map, less than five acres of upland, and a pier and dock adjacent.

That instead of selecting a site for a landing and boarding station upon the westernmost end of Coney Island, as authorized by the act, the commissioners have, in substance, appropriated the whole westernmost end of the island, and have, in fact, selected, and are proceeding to acquire title to, more than sixty times as much land as is necessary for the purposes authorized by law, and more than ten times as much as would be necessary for the whole quarantine establishment, including hospitals and a place for persons not sick, who have been exposed to contagious or infectious diseases.

And the plaintiffs aver that the proceedings of the defendants are wrongful and fraudulent as against the plaintiffs. That they are grossly and wrongfully exceeding the powers given them by law to acquire title to a site for a landing and a boarding station, and are proceeding under cover and pretence of said law, but in contravention thereof, and in violation of law and of right, and for ulterior objects and purposes not sanctioned by law, to acquire title to, and get pos-

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session of, a large tract of land, with an extensive water front, not necessary for the purposes for which alone the legislature has allowed any land upon Coney Island to be taken for quarantine purposes.

And plaintiffs show that such proceedings, if not stayed by the interposition of this court, will produce great and irreparable injury to them, and for which they have no adequate remedy by the rules of common law.

Plaintiffs therefore pray that the selection of the tract of land above described upon Coney Island, as a site for a landing and boarding station, may be set aside, and that the defendants, their attorneys and agents, and all other persons acting for, under or with them, may be enjoined by the order of this court from taking, carrying on or continuing any proceedings to acquire title to said tract of land, or for the appraisement of the compensation to be paid therefor, and from taking possession of or in any manner interfering with the said land or any part thereof, and that said injunction may be made perpetual, with costs of this action; or for such further and other relief as to the court may seem just and proper in the premises.

BENJ. G. HITCHINGS, *Attorney.*

County of Kings, ss:

Jacques J. Stilwell, being duly sworn, says, that he is supervisor of the town of Gravesend, the plaintiffs in this action; that the foregoing complaint is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

JACQUES J. STILWELL.

Sworn to before me, this 29th }
day of July, 1867. }

E. WILSON BLOOM,
Notary Public for Kings Co.

ANSWER.—The defendants above named, appearing in this

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action by H. W. Johnson, as their attorney, make the following answer to the complaint:

I. Upon information and belief, they deny that the plaintiffs are the owners in fee simple or otherwise of Coney Island, situate within the town of Gravesend, in the county of Kings; and on the contrary thereof, they allege that said plaintiffs have no interest whatever in said island, or any part thereof, but that the same is owned by Martin Schoonmaker, Nicholas Stilwell, and a large number of other persons residing mostly in said town.

II. They allege that, pursuant to the act of the legislature mentioned in the complaint, all that part of said island which is described in said complaint has been duly designated and selected as a site for a landing and boarding station, for the purposes in said act specified, and a certificate of such selection has been duly filed, as required by said act; that they have been unable to acquire title thereto at a price approved by the governor; and they admit that, in consequence thereof, they design to acquire title thereto by the legal proceedings authorized by said act, and that they have given notice that a petition for that purpose will be presented by them to this court, at a special term thereof to be held in the city of New York, on the first Monday of August, 1867.

III. These defendants are ignorant of the precise quantity of land embraced within that portion of said island which has been so selected and designated as aforesaid, but upon information and belief they deny that it embraces the quantity or has the water front stated in said complaint, and they deny that it grossly exceeds, or in any manner or respect exceeds in quantity what is necessary for the legitimate purposes of a landing and boarding station; and they deny that a landing and boarding station, within the intent and meaning of the law, is only a place for the location of the health officer and his subordinates, from which to go to board vessels arriving at the port of New York, or that five acres square of upland, with the water front adjacent to it, would

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be amply sufficient for the purpose and afford every convenience. And said defendants further deny, that they, or the officers and boards mentioned in the acts aforesaid, have, in fact or in substance, selected, or that they are proceeding to acquire title to more than sixty times, or any other number of times, as much land as is necessary for the purposes authorized by law or by the act aforesaid, or that they have selected or are proceeding to acquire title to more than ten times or any number of times as much as would be necessary for the whole quarantine establishment, including hospitals and a place for persons not sick, who have been exposed to contagious or infectious diseases; but, on the contrary thereof, these defendants aver that the quantity of land selected and designated as aforesaid, considered with reference to its peculiar character and location and surroundings, in no respect exceeds, but in fact falls short of, what is really required for the purposes specified in the act aforesaid.

IV. These defendants further deny that their proceedings have been in any respect wrongful or fraudulent as against the plaintiffs or any other parties or persons, or that these defendants are in any respect grossly or wrongfully exceeding the power given them by law to acquire title to a landing and boarding station, or that under cover or pretence of said law, but in contravention thereof, and in violation of law or of right, and for ulterior objects and purposes not sanctioned by law, they are proceeding to acquire title to and get possession of a large tract of land, with an extensive water front, not necessary for the purposes for which alone the legislature allowed any land on Coney Island to be taken for quarantine purposes; but on the contrary thereof, these defendants allege that, in all their proceedings under the act aforesaid, they have been actuated solely by the intent to carry out what they conceived to be the real object and purposes of said act, and with a view to secure to the state what they believed to be absolutely essential to the due administration and observance of the quarantine rules and regulations.

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of the port of New York. And these defendants deny that their proceedings, if not stayed by the interposition of this court, will produce great and irreparable injury, or any injury whatever, to said plaintiffs, for which they have not an adequate remedy at common law.

Wherefore, these defendants pray that said complaint may be dismissed, with costs.

H. W. JOHNSON,
Attorney for defendants.

City and County of New York, ss:

Cyrus Curtiss, being duly sworn, says, that he is the president of the board of commissioners of quarantine, and one of the defendants in the above entitled action, and that the foregoing answer is true to his own knowledge, except as to those matters that are therein stated on information and belief, and as to those matters he believes it to be true.

CYRUS CURTISS.

Sworn to before me, this 1st }
day of August, 1867. }

W. H. MORGAN, notary public.

BENJAMIN G. HITCHINGS and
HENRY C. MURPHY, counsel for plaintiffs.

I. Upon the facts stated in the complaint, a case is made out of the strongest possible character for judicial relief.

The case, upon plaintiffs' allegations, is not only one of flagrant wrong on the part of the defendants, but the injury to ensue to the plaintiffs' from their proceedings, if they are permitted to consummate them, will be of the gravest character, involving their not only being deprived of a large amount of property, but also great and irreparable injury to other property not taken, aside from other consequences.

The right of taking private property for public use rests entirely upon necessity, and courts have been and should be vigilant in protecting the citizens from its abuse.

Even an act of the legislature which provides for the taking of more land than is necessary for the public use is void. (*Matter of Albany street, 11 Wend. 143; Embury agt Conner, 3 Comst. 511.*)

We complain that the defendants, acting under power conferred upon them by the legislature to select and acquire title to property for a specified purpose, instead of selecting a suitable plot of not more than five acres, with a water front of a few hundred feet, which would have been amply sufficient for the purpose, have selected, and are proceeding to acquire title to several hundred acres of land, with a

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water front of three miles, , ostensibly for the purpose authorized by the act, but in reality for other purposes.

If this allegation is maintained, the right to relief from such proceedings is beyond question.

II. The jurisdiction of courts of equity to interpose, by injunction, in a case such as made by the complaint, is entirely settled by numerous authorities, and in fact has never been disputed. (*Mohawk R. R. agt. Aricker*, 6 *Paige*, 87, 89; *Gardner agt. Newburgh*, 2 *Johns. Ch.* 162; *Belknap agt. Belknap*, 2 *Johns. Ch.* 463; *Albany R. R. agt. Brownell*, 24 *N. Y.* 345; *Oakley agt. The Trustees of Williamsburgh*, 6 *Paige*, 262; *Wetmore agt. Story*, 22 *Barb.* 415; *Williams agt. The N. Y. Central R. R.* 16 *N. Y.* 97, 111; *Corning agt. The Troy Iron Factory*, 39 *Barb.* 325; 2 *Kent's Comm.* 339, note c.; *Redfield on Railways*, § 205; *Webb agt. The Manchester Railway*, 1 *Railway Cas.* 576; *Webb agt. The Manchester Railway*, 4 *Mylne & Or.* 116; *Bird agt. The W. & M. Railway*, 8 *Richardson Eq. R.* 46; *Agar agt. Regents Canal Co. Cooper's Cas. in Ch.* 77; *Bonaparte agt. The Camden R. R.* 1 *Baldw. C. C.* 226.)

It is no objection to the equitable jurisdiction that there may be other remedies. (*Cases above cited.*)

The case of liens upon land for illegal taxes and assessments, stands upon different ground, and has in some degree been made an exception from the current of decisions.

In *Mesrole agt. The Mayor* (26 *Wend.* 132), the court of errors decided that the assessment being illegal and void, it could not be enforced, and was therefore no cloud upon the title; but in *Scott agt. Onderdonk*, (14 *N. Y.* 9), it was decided, that inasmuch as the deed to be given by the sheriff on a sale for assessment was *prima facie* evidence of the regularity and validity of the proceedings that chancery had jurisdiction to stay such proceedings by injunction.

But these are cases of *mere liens* upon land, and no case can be found where equity has refused to interfere to prevent illegal proceedings which aimed at depriving a man of his land, or doing a permanent injury to it.

"Courts of chancery have jurisdiction to proceed by injunction, where public officers, under a claim of right, are proceeding illegally and improperly to injure or destroy the real property of an individual or corporation, although the defendant may may be sued at law." (*Redfield on Railways*, § 205; 6 *Paige*, 88.)

"Courts of equity will enjoin a railway from taking land *ostensibly under their powers for one purpose, when in fact they desire it for another* not within their powers. And in all cases of doubt with respect to their power, the conclusion should be against its exercise." (*Redfield on Railways*, § 205; *Webb agt. The Manchester Railway*, 1 *Railw. Cas.* 576; 4 *Mylne & Cr.* 116.)

In that case, the lord chancellor ordered a commission to ascertain whether the land which the railroad was seeking to acquire was actually necessary for purposes within their powers, and, upon coming in of the report, ordered a perpetual injunction.

So in *Agar agt. The Regent's Canal Co.* (*Cooper's Cas. in Ch.* 77), the chancellor ordered an issue to ascertain whether the land sought to be acquired was within the limits of the canal fixed by the act.

It is important to observe that the railroad act, made applicable to this case, provides that, upon the completion of the proceedings to ascertain the compensation and payment thereof, or deposit of it in court, the commissioners are authorized to take possession and use the land, "and all persons made parties to the proceedings are forever barred and divested of all right, estate or interest in the land." (*Laws of 1850*, p. 29, § 18.)

It is much more than doubtful whether, if the proceedings to acquire title were

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completed, ejectment or trespass would lie, and the points upon which we rely could not be raised and tried in the proceedings to fix the compensation, nor upon certiorari.

So that the remedy by injunction is not only the proper one, but probably the only one.

III. The board of health and the mayors of the two cities are not necessary or proper parties.

They have no interest whatever in the matter, and nothing further to do in regard to it. They were mere agents in selecting the site, and having done that, are *functus officio*.

By the act, if they had not concurred in selecting a site within thirty days from the passage of the act, their power would have been gone, and others were to act in their stead.

If we should make them parties, it is plain that they would have a clear right to have the complaint dismissed, with costs, as to them, on the ground that they have no interest in the matter. Of course we could have no injunction against them, for they have nothing to do and are doing nothing.

By the law, the quarantine commissioners alone, after the selection of the site, are to proceed to acquire the title, and alone are so proceeding.

Besides, no such point is made by demurrer or answer, and a defect of parties must be raised by one or the other. (Code, §§ 148, 144.)

IV. The case made by the complaint and affidavits on the part of the plaintiffs, is not changed or impaired by the answer and affidavits on the part of the defendants.

1st. The legislature intended to provide, and did provide, that no part of the quarantine establishment, but merely the landing and boarding station, should be located upon Coney Island. They specially provided for the location of every part of the establishment which might be dangerous or infectious elsewhere. A landing and boarding station was evidently considered, and, if used for its legitimate purposes only, no doubt is perfectly innoxious.

2d. The allegation of the complaint and affidavits, that five acres of land, with the water front adjacent, is all that is necessary for the actual uses and purposes of a landing and boarding station, is in no way contradicted or denied.

It was all that they had for that purpose on Staten Island, and all that they reserved for that purpose out of the sale of their lands there, and the station on Coney Island, was, by the act, to be instead of that on Staten Island.

No uses of such a station are set out requiring more than five acres.

Swinburne enumerates the uses and makes the most of them, but he does not say that those uses require more ground than we alleged was sufficient.

3d. It is undisputed that the site they claim to have selected embraces several hundred acres of land, with about three miles water front. That it includes the whole west end of the island, and all the water front upon the whole island capable of being used for docks or landings, thus cutting off the rest of the island from access by water.

4th. The purport of all the opposing affidavits is, that the main object which the commissioners had in view in making the selection was *isolation*.

They have not, in fact, selected a site for a landing and boarding station, but have taken territory to include and isolate one. The site is yet to be selected out of the territory which they have designated.

5th. There is nothing in the opposing papers to negative the charge which we make as an inference from the above facts, that they have not made the selection *bona fide* for the purposes of a landing and boarding station, but for other purposes not authorized by the act; and if they had in view purposes not authorized by the

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act, it is of no consequence that they may have thought those purposes meritorious and beneficial to the public.

V. It is clear, even upon the ground taken by themselves, that they have exceeded the powers given them by the legislature.

1st. They had no power conferred upon them but to select a suitable site upon the west end of Coney Island, for the actual uses and purposes of a landing and boarding station.

They had no right to take plaintiffs' property for the purpose of isolating such site or station.

2d. They have shown no necessity or good reason for isolating it.

They talk about invasion and danger from communication with the people.

Swinburne thinks it desirable to erect a barrier across the island on its eastern boundary.

It is said it would be very improper to have persons bathing near it.

Another object was to prevent people from starting from the island at night in boats to visit vessels at quarantine.

They had no right to take plaintiffs' land for any such purposes.

The invasion spoken of must mean for the purpose of destroying the buildings and property to be put there.

They had no power given them to take land for that purpose.

3d. It does not appear that it couldn't be isolated as well, if confined to five acres, as if it embraced five hundred.

4th. The action of the commissioners in this alleged selection of a site shows a reckless, wanton and high-handed disregard of the rights of the owners of the land.

The only object seems to have been to take as much land as might ever be wanted for any purpose.

They might as well have gone upon any other housetop and run a line due south, or due east, and have taken the whole island.

5th. The affidavits on the part of the defendants are of the most vague and unsatisfactory kind. When carefully examined, there is nothing in them upon which any court can form any satisfactory judgment.

It would be permitting a gross outrage upon private rights to allow a large and valuable tract of land to be taken upon these vague, unmeaning allegations about the necessity or desirability of isolation.

VI. We, however, maintain that the ground of isolation set up in their affidavits is merely a convenient subterfuge; that they have made the selection, not *bona fide* for the uses and purposes of a landing and boarding station, but for other purposes not authorized by law.

What their motives and purposes were, it is unnecessary for us to show. They have undertaken to "secure a tract of land ten times more than sufficient for the whole quarantine establishment, on a grand scale." They may not intend to use it for all quarantine purposes until further legislation, and they may or may not intend to obtain further legislation.

VII. It is claimed, no doubt, in this case, that the commissioners had a discretion, in making the selection, which cannot be interfered with. That is, no doubt, the rule, where the discretion is exercised according to law and in good faith, and with fairness; but illegality and unfairness have always been exceptions to the rule. (*Phillips agt. Wickham*, 1 Paige, 590; *The Oneida Falls Bridge Co. agt. Fish*. 1 Barb Ch. 547; *Walker agt. Devereux*, 4 Paige, 230; *Agar agt. Regent's Canal Co.* 1 *Cooper's Cas. in Ch. 77*; *Webb agt. Manchester Railway, a Railway Case*, 575.)

VIII. The admitted facts in the case being such as to justify and sustain the inference that this ground was not *bona fide* selected only as a site for a landing and board-

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ing station, but with a view to other purposes, if the answer and affidavits upon the other side are supposed to controvert that position, the injunction should be allowed and continued until that question is decided at the hearing.

It cannot be supposed that defendants' affidavits settle that question in favor of the defendants; and we should have an opportunity to try it.

It is a proper case for an issue, (*Agar agt. The Regent's Canal Co. Cooper's Cas. in Ch. 67; Webb The Manchester Railway, 1 Railway Cas. 576; 4 Myl. & Cr. 116.*)

IX. The act of 1851, in relation to state officers and state bonds of officers, does not apply to these commissioners.

The second section shows clearly that it only refers to those general state officers for whom it was the duty of the attorney general to appear, and that the law was made for his benefit.

So decided, *N. Y. and Harlem R. R. agt. The Mayor*, 1 Hill, 562.

However, we have also given notice for the general term.

H. W. JOHNSON, for defendants.

By the court, GILBERT, J. (No written opinion given.) Order of special term reversed, and ordered that an injunction issue pursuant to the prayer of the complaint.

NEW YORK COMMON PLEAS.

ISAAC HERMAN agt. NEWMAN AARONSON.

An application, under section 199 of the Code, for the refunding of money deposited in lieu of bail, on the arrest of a defendant, cannot be made until bail has been put in and justified.

Special Term, December, 1867.

MOTION under the 199th section of the Code, to refund money deposited with the sheriff, instead of bail, at the time of the arrest of the defendant. The application was that the money be refunded, not to defendant, but to *J. Aaronson*, son, who, it is claimed, deposited it to secure the discharge of defendant from arrest. The motion was made *before the bail had justified*. There was some conflict in the affidavits, as to whether the money belonged to defendant or to *J. Aaronson*. The money was also claimed to have been attached as the defendant's property.

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FREDERICK SMYTH, *for the motion.*

A. BLUMENSTIEL, *opposed.*

VAN VORST, J. I am satisfied that this motion cannot be granted. Section 199 of the Code provides, that, if money be deposited as provided in the last two sections (197 and 198), bail may be given and justified upon notice as prescribed in section 193, any time *before judgment*; and thereupon the judge before whom the justification is had shall direct, in the order of *allowance*, that the money deposited be refunded by the sheriff to the *defendant*. No application for the refunding of the money can be made until the bail has actually justified, and under notice of not less than five nor more than ten days. It does not appear that any notice of justification has been served on the other side, or that the bail have justified. The right to substitute an undertaking, with sureties, in the place of the money deposited, does not depend upon the favor of the court. It is given by the express provisions of the Code. The party should give bail to the sheriff, just as he would in the first instance, if no deposit had been made. The plaintiff should have an opportunity to except to the sureties, and he has ten days in which to do this, after receiving from the sheriff a copy of the undertaking.

After the justification of the sureties, the application for the deposit may be made.

In addition to this, there is no provision of law authorizing the money to be paid to any person other than the defendant himself. The application in this case is, that the money be refunded, not to defendant, but to J. Aaronson, who, it is claimed, deposited the same with the sheriff, to procure the defendant's discharge from arrest. This the court is not authorized to do. There is a *per curiam* decision in *Numm agt. Powell* (1 *Smith's Reports*, 13), seemingly to the contrary; but this was in a contest between the depositor, a third party, and the defendant, after special bail had been perfected, there being no other claimants.

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In *Eddsten agt. Adams* (2 *Moore*, 610), it was held, that the money should be refunded to the defendant. In the latter case, the money had been deposited by a friend of the defendant, and was claimed by the assignees of the defendant, who had become bankrupt. BURROUGHS, Justice, said: "The sum in question must be considered in *custodia legis*, and the court, by statute, are empowered to refund it to the defendant alone." These cases arose under the statute (43 G. III, ch. 44), which contains provisions on the subject, in many respects similar to the sections of the Code under consideration.

In *Salter agt. Weiner* (6 Abb. 191), it was held, that the money, by being deposited, became the property of the defendant. There is good reason for such opinion, as the money is substituted for the person of the defendant who is under arrest. It is practically so, at least until bail is put in and justified, and it may be taken and applied to the satisfaction of the judgment against defendant, when entered. (§ 200).* In the event that there were no conflicting claims made to the money by the defendant, or others, the court could doubtless, at a proper time, make an order to pay the deposit to a third party, who had advanced it for the benefit of the defendant, on his arrest. (*Douglass agt. Stanbrough*, 3 *Adol. & Ellis*, 316; *Buell agt. Turner*, 1 *Mee. & W.* 47.)

The case before me does not show a state of facts which would at present authorize the refunding of the money to any person.

The other objections raised by plaintiff, that the motion is too late, on the ground that judgment has been already ordered in the action for the plaintiff's claim, although the record is not yet actually filed, and that the moneys have been attached as the defendant's property, are not necessary to be considered in the view that I have taken of the question.

Motion denied.

* NOTE. In Voorhies' edition of the Code, in a note to section 200, p. 384, "It is said, that this decision was reversed on appeal." But such reversal, if made, does not affect the above authority, as the motion in this case was denied, as it appears, on the ground that it was made before the bail had justified.—REP.

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SUPREME COURT.

TRUMBALL C. KIMBERLY, receiver, &c., appellant agt. ALVAN E. PARKER, respondent.

The practice which prevailed before the Code, of moving for judgment, as in case of nonsuit, for not bringing the cause to trial, on showing that later issues upon the calendar had been tried, is still continued under the present revision of the rules, by rule 27.

But this practice, as well as the rule referred to, govern the disposition of only such causes as may be noticed and placed upon the calendar for trial at the circuit. It is entirely unadapted to causes that have been referred.

Before the revision of the rules of 1847, the only mode in which the defendant could dispose of an action which had been referred, was to apply to the court, by special motion, for leave to notice and bring on the trial of the cause himself; and if such leave was given, to notice the cause for trial, and obtain a report against the plaintiff. The substantial advantages secured by this practice to the defendant have been preserved and continued by the Code, by conferring upon him the right to notice and bring on the trial before the referee, without any special leave of the court.

By the revision of the rules of 1847, rule 43 allows the defendant, without procuring leave to notice and bring on the hearing himself, to give notice to the plaintiff, requiring him to bring the cause to trial within forty days; and if he fails to do so, the defendant is at liberty, upon showing these facts, to move for judgment, as in case of nonsuit.

There is nothing in the authority conferred by the Code upon the defendant, to notice the cause for trial himself, that is inconsistent with the continuance of this practice under rule 43. Both may exist together, without any real or apparent conflict whatever.

Therefore, under the state of practice provided for by the Code, allowing the defendant to notice the cause and bring on the trial, the previous practice, providing for motions for judgment as in case of nonsuit, are still available in actions that have been referred.

But the defendant cannot move for judgment as in case of nonsuit under the 43d rule, without first giving the notice requiring the plaintiff to bring on the trial of the action, as that rule prescribes. That notice, as well as the plaintiff's default in complying with it, are indispensably necessary to entitle the defendant to judgment, as in case of nonsuit, where the action has been referred.

A motion for judgment as in case of nonsuit cannot be made by a single defendant under section 274 of the Code, as that section provides only for those cases where there are several defendants, and the plaintiff has unreasonably neglected to serve the summons on some or one of them, or to proceed in the cause against the defendant or defendants who may have been served.

Eighth District, Buffalo General Term, November, 1867.

Before DANIELS, MARVIN and DAVIS, Justices.

This action has been referred to a referee; and on or

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about the eighth day of August, 1866, the plaintiff's attorney served a notice of trial by mail upon the defendant's attorney, giving notice that it would be brought to trial before the referee, at Batavia, on the twenty-third of that month. The defendant appeared with his witnesses, at that time, at Batavia; but the referee did not appear, and had not been requested to appear by the plaintiff or his attorney, to hear the cause, and no hearing or trial was had. The defendant moved for judgment at the special term, held in Allegany county, for a dismissal of the complaint, for want of prosecution, on account of the omission of the plaintiff to proceed to trial before the referee, pursuant to such notice. The court granted the motion, unless the plaintiff should, within ten days, pay the defendant's witnesses' fees for attendance at Batavia, pursuant to the notice of trial, and ten dollars in addition thereto, together with seven dollars' costs of the motion.

From this order the plaintiff appealed.

H. WILBUR, *for appellant.*

WILKES ANGEL, *for respondent.*

DANIELS, Justice. The motion made in this case is what would have been known under the system of practice which prevailed before the Code, as a motion or judgment, as in a case of nonsuit. The cases in which such motions could be made, the facts which warranted them, and the terms upon which they were usually disposed of, were clearly defined and settled by that practice. (1 *Burrill's Practice*, 420, 422.) And that practice is still continued under the present revision of the rules, by rule 27. But this practice, as well as the rule referred to, govern the disposition of only such causes as may be noticed and placed upon the calendar for trial at the circuit. It is entirely unadapted to causes that have been referred; for the defendant must show by his affidavits, on which the motion is founded, either that the cause

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has not been noticed for trial at all, and could have been tried if it had been, or that, being noticed and upon the calendar, it was not moved by the plaintiff, and later issues were tried at the circuit. It would be obviously impracticable to comply with these requirements, where the cause has been referred to be tried before a referee. For that reason this rule of practice was regarded by the courts as including only such actions as could be properly noticed for trial at the circuit. The motion could not be regularly made under it, therefore, in an action that had been referred. This was so held in *Ex parte Sheldon* (12 Wend. 268).

Before the revision made of the rules of this court, in 1847, the only mode in which the defendant could dispose of an action that had been referred was to apply to the court by special motion, for leave to notice and bring on the trial of the cause himself. And if that leave was given, as it always was when a proper case arising out of the plaintiff's default was shown, the defendant could notice the cause for trial, and obtain a report against the plaintiff from the referee. (*Bissell agt. Lee*, 16 John. 45). The substantial advantages secured by this practice to the defendant have been preserved and continued by the Code, by conferring upon him the right to notice and bring on the trial before the referee, without any special leave of the court being secured for that purpose. But this renders it necessary that the defendant shall subject himself to expenses of preparing for the trial of the cause, and of securing the attendance of his witnesses, at the time when, according to his notice, he intends to bring on the trial of the action. In cases where the plaintiff should be irresponsible, and has no meritorious cause of action, this mode of proceeding would prove peculiarly burdensome to the defendant; so much so, in many instances, as to subject him to great loss, as well as positive injustice.

The inconvenience and injustice which the practice previously existing produced, secured the adoption of the forty-third rule, contained in the revision of 1847 for government

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and disposition of actions that had been referred. By this rule the defendant, without procuring leave to notice, and bring on the hearing himself, was allowed to give notice to the plaintiff requiring him to bring the cause to trial within forty days; and if he failed to do so, the defendant was then at liberty, upon showing those facts, to move for judgment, as in case of nonsuit. There is nothing in the authority now conferred by the Code upon the defendant, to notice the cause for trial himself that is inconsistent with the continuance of this practice. Both may well exist together without any real or apparent conflict whatever. And that view of the provisions of the Code is maintained by the present rules of the court in respect to causes which may be noticed and brought on for trial at the circuit. For in those causes, the defendant may notice the action for trial, place it upon the calendar, and bring on the trial under the express provision of the Code. And by the existing rule he may, if he so elect, omit to notice the action for trial at the circuit, and move for a dismissal of the complaint at the special term. There is no more conflict between the former mode of proceeding in this respect and that provided by the Code in cases that may have been referred, than there is between them where the trial must be had at the circuit, and under the state of practice provided for by the Code, allowing the defendant to notice the cause and bring on the trial, the previous practice providing for motions for judgment as in case of nonsuit, would seem to be still available in actions that have been referred. For where there is no inconsistency between the new and the old practice, the latter to that extent has been continued in force (*§ 469 of Code of Procedure.*) And in all those cases where no provision has been made by the statute, and no rule in the present revision has been made for their government, the rules previously adopted continue to exist. (*Rule 93 of Supreme Court.*)

But the mode of practice provided by the forty-third rule adopted in 1847 will not sustain the order made by the

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special term, from which the plaintiff has appealed, for no notice was ever given by the defendant requiring the plaintiff to bring on the trial of the action, as that rule prescribes. And that notice, as well as the plaintiff's default in complying with it, are indispensably necessary to entitle the defendant to judgment, as in case of nonsuit where the action has been referred.

The defendant, however, insists that the course pursued in this case is warranted by subdivision four of section 274 of the Code. But that does not provide for dismissing the complaint of the plaintiff on account of his unreasonable neglect to bring the issue in the action to trial. It provides only for those cases where there are several defendants, and the plaintiff has unreasonably neglected to serve the summons on some, or one of them, or to proceed in the cause against the defendant or defendants who may have been served. The first part of this subdivision, by its express language, relates only to those cases where all the defendants in the action have not been served with the summons. The latter branch, though not as clearly expressed, implies that it was intended to relate to actions in the same condition as those previously mentioned, that allows the defendant who may have been served with the summons, and as to whom an issue may have been joined, or a complaint demanded and not served, to move to dismiss the complaint, on account of the plaintiff's unreasonable neglect to proceed against him, notwithstanding the fact that there may be other defendants in the action who have not been served with process. The defendant or defendants who are thus authorized to move for a dismissal of the complaint, are designated as those who have been "served" for the purpose of distinguishing them from the other defendants in the action, and the action itself, from those in which all the defendants may have been served with the summons. The word "served" is used as a distinguishing circumstance, for the purpose of indicating the cases in which, as well as the party by whom, the motion

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may be made. If this part of the subdivision had been intended to include cases in which all the defendants were before the court, the word "served" would most probably have been omitted, because that intention could have been more clearly and much better expressed without it. But the word is pre-eminently and significantly used, and from the connection in which it is found, it must have been intended to so far qualify the subdivision as to limit its application to the class of cases so clearly described in the preceding portion of it. If it does not perform that office it can be of no practical service or meaning whatever.

By a well settled rule of the preceding practice, a defendant or defendants jointly sued with others could not move for judgment, as in case of non-suit, because the plaintiff unreasonably neglected to proceed against them, or to bring those not served with process before the court. Those who were served were bound to wait, until all had been served with process and issue was joined as to all, or the other defendants had made default, before they could move for judgment, as in case of nonsuit. This was often found to be a serious defect in the practice, and it frequently occasioned great embarrassments, producing needless delays and injustice. The subdivision under consideration supplied this defect, and corrected the mischief produced by it. It was probably to accomplish that result that it was created as a part of the Code; and its utility in this respect must tend very much to confirm the propriety of the construction placed upon it. This subdivision could not, for the reasons stated, have been intended to warrant the proceeding resorted to for the purpose of dismissing the complaint in this case; and there is nothing else in the Code which can in any manner support it.

Where a party, without intending to bring the cause to a hearing, serves upon his adversary a notice of trial, or afterwards wantonly or unreasonably refuses to bring on the trial before the referee, for the purpose of subjecting his opponent

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to unnecessary trouble and expense, the court, by virtue of its general control over its suitors and officers, would undoubtedly have the power to impose the payment of such expense, by way of punishment, upon the party whose unjustifiable conduct occasioned it. And if that had been the order applied for and directed in the court below, sound and wholesome reasons could be found for sustaining it. But such was not the nature of the proceedings taken by the defendant. The object of those taken by him was the dismissal of the complaint, which, under the circumstances disclosed, had no well founded authority for its support.

The order of the special term must therefore be reversed.

MARVIN, J., dissenting.

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SUPREME COURT.

HARRISON CHAPMAN agt. ASIL CHAPMAN.

An *answer* is good which states as follows: "The defendant answering the complaint, in this action, says, he denies each and every allegation contained in the complaint." The word "says" he denies, &c., does not make the answer frivolous."

Cortland Special Term, January, 1868.

MOTION by plaintiff for judgment, pursuant to section 247 of the Code, for frivolousness of the answer of the complaint.

The action was an equitable one, and the plaintiff demanded judgment in the complaint, that the defendant execute a deed of certain land; and the answer was as follows: "The defendant in this action, in answer to the complaint of the plaintiff, says that he denies each and every allegation in said complaint, except that the said plaintiff caused to be prepared a deed of said premises, and demanded the execution thereof, and that defendant refused to execute the same."

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O. PORTER, *for plaintiff.*
HOYT & SMITH, *for defendant.*

BALCOM, J. It is claimed that the answer is frivolous, because it is that the defendant "says that he denies," &c., instead of being simply that the defendant "denies," &c. It is conceded it would be good if the words "says that he" had been left out of it. *Arthur* agt. *Brooks* (14 Barb. 533) and *Blake* agt. *Eldred* (18 How. Pr. R. 240) are relied upon to show that the answer is frivolous: These authorities support that position ; but, with all due deference to them, I am unable to satisfy myself that the answer should be adjudged frivolous.

It is provided by section 149 of the Code, that the answer may contain "a general or specific denial of each material allegation of the complaint controverted by the defendant."

It also provides that "in the construction of a pleading, for the purpose of determining its effect, its allegations shall be liberally construed, with a view of substantial justice between the parties." (*Code*, § 159.)

If a witness should say, "I swear my name to the note, shown me, is a forgery," it would require "optics keen" to see any material difference between it and the following, viz: "My name to the note, shown me, is a forgery."

If a person should declare, "I say I was at Washington on the first day of January, 1868," very few persons would think the assertion any stronger, if he should omit the words "I say" and declare, "I was at Washington on the first day of January, 1868."

I do not doubt that an answer is good that is as follows: "The defendant, answering the complaint in this action, *says*, he denies each and every allegation contained in the complaint.

My conclusion is, that the answer in this action should not be struck out as frivolous, and that the plaintiff's motion for judgment, for the alleged frivolousness of the answer, should be denied.

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COURT OF APPEALS.

**STEPHEN BRUSH, executor, respondent agt. WILLIAM LEE
et al., appellants.**

Where a judgment of a justice of the peace for \$25 or over, exclusive of costs, is docketed with the clerk of the court of common pleas of the city and county of New York, the execution thereon should be issued by the party or his attorney, not by the county clerk.

There is no rule of law or of public policy precluding an attorney from entering into an agreement with one not an attorney, to enter his office and act as his clerk, compensating him therefor by giving him an interest in the business. Such clerk can properly issue an execution upon a judgment in the name of the attorney.

January Term, 1867.

IN MARCH, 1860, one Edmonds obtained a judgment in a district court of the city of New York, for about eighty dollars, against the plaintiff's testator, for which an appeal was taken, but not the requisite steps to stay execution. A transcript of the judgment was docketed with the clerk of the court of common pleas, and an execution issued by A. B. Clark, an attorney for that court, to whom the judgment had been assigned by Edmonds, to the sheriff of the city and county of New York, where the testator then resided, and where he had ample personal and real property to satisfy the same. Nothing was done by the sheriff upon this execution. A transcript of the judgment was shortly after docketed in Kings' county, and an execution issued to the sheriff of the latter county by defendant Niles, not an attorney, but a partner with Clark in the law business, in the name of Clark as attorney; upon which latter execution real estate in Brooklyn was levied upon and sold, and bid off by Edmonds for about one hundred dollars, being of the value, over and above incumbrances thereon, of about ten thousand dollars: The testator was entirely ignorant of the issue of either execution, and of the sale of the property in Brooklyn, and continued to receive the rents of the property until his death,

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March 18, 1863. The testator believed that the necessary steps had been taken, and the execution stayed by the appeal. Edmonds, shortly after the sheriff's sale, sold the certificate of the sale to defendant Lee, who paid therefor the amount of the bid; and the property not having been redeemed, either by the judgment debtor or any incumbrancer at the expiration of the time for that purpose, obtained a deed from the sheriff of the property sold, but which was not placed upon the records for some time thereafter. In the summer of 1863, the plaintiff, to whom the property sold had been devised in trust, having learned the facts of the sale and conveyance by the sheriff, commenced this action to have the sale and conveyance adjudged void, for the reason that it was a cloud upon his title, basing his claim to such relief upon the ground that the execution was void, having been issued by the attorney; and that Niles had used the name of Clark in issuing the execution; and, also, that Niles and Lee had been guilty of fraud in issuing the execution and concealing the sale and conveyance by the sheriff. The court, upon trial at special term, found as fact the defendant Niles fraudulently concealed from the testator his acts in the premises, and that defendant Lee was a party to such fraudulent concealment, after becoming assignee of the certificate; and as conclusion of law, that the execution was void, upon the ground that it was issued by the attorney of plaintiff, and not by the clerk, and gave judgment declaring the sale and the sheriff's deed void, and ordering the cancellation of the same. The defendants took several exceptions to the decision as to the findings of fact and of law, but no exception raising the point as a question of law that there was no evidence whatever of fraudulent concealment.

After entry of judgment, the defendants appealed to the general term in the first district, and, after affirmance by that court, appealed to this court.

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*GEORGE C. BARRETT, for respondent.
A. R. DYTETT, for appellant.*

GROVER, J. The special term erred in holding as a conclusion of law, that the execution should have been issued by the clerk, and not the party or his attorney. Section 68 of the Code, among other things, provides that section 55 to 64, both inclusive, shall apply to the justices' courts of the cities, with the following, among other exceptions: and except, also, that in the city and county of New York, a judgment of twenty-five dollars, or over, exclusive of costs, the transcript whereof is docketed in the office of the clerk of that county, shall have the same effect as a lien, and be enforced in the same manner as and be deemed a judgment of the court of common pleas for the city and county of New York. This, it would seem, could leave no doubt but that such judgments were to be enforced in the same manner as judgments rendered by the court of common pleas of the city. The Code provides that these latter judgments shall be enforced by executions issued by the party or his attorney. It will be seen that it is by the 13th clause of section 64, that provision is made for the issuing of executions upon judgments of justices of the peace, where transcripts have been filed with county clerks by such clerks. The exception in 68, referred to above, does not make this clause applicable to the city and county of New York, but expressly provides another mode for the enforcement of the judgment. The execution was rightly issued by the attorney. There is nothing in the objection that the execution was issued by Niles, who was not an attorney, in the name of Clark. There is no rule of law or of public policy precluding an attorney from entering into an agreement with one not an attorney, to enter his office and act as his clerk, compensating him therefor by giving him an interest in the business. In such a case, the attorney is responsible to the courts, and to all interested, to the same extent he would be if all the business

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was done by him personally. The exception to the proof offered upon trial, as to the amount of the property of the testator, was not well taken, for the reason that such proof could have no possible bearing on the case one way or the other. The party had just as clear a right to issue the execution to Kings county, and collect it there, if the testator had millions of property in New York, as he would have had if he had none there. This right so to do was perfect in either event. (*Code*, § 287.) It is clear that the rights of the defendants could not in any way be affected by such evidence, and where this is the case an exception to the evidence is unavailing. It is clear that but for the finding of the fact by the court at special term, that the defendants fraudulently concealed the issuing of the execution to Kings' county, and the sale and conveyance of the property by the sheriff, the judgment should be reversed and a new trial ordered.

If that fact was correctly found, it authorizes the judgment rendered. No exception that there was no evidence of such fraud was taken by the defendant. Had such exception been taken, the question whether there was or was not any such evidence could have been reviewed by this court. It is error of law for a court to find a fact of which there is no proof whatever. But to make such error available in this court, the proper exception presenting it must be taken to the court below, as this court, upon appeal, except in special cases regulated by statute, reviews only questions of law passed upon by the court below. I make these observations lest an affirmance should be regarded as an approval of the finding of fact by the special term in this case.

I have perused the case, and am wholly unable to see how such a finding can be sustained. Neither Edmonds, his attorney, nor Lee, were under any obligation to inform the testator or his attorney of the issuing of the execution, or of the levy and sale of the property. It was the business of the testator and attorneys, either to stay the execution upon the appeal, or

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protect his property, wherever found, from its operation. The judgment creditor had the right to collect his judgment in the mode pointed out by law; and if the testator had real estate in Kings, or any other county, it was no fraud upon him to collect the debt out of such property, although he had ample personal property in the city of New York out of which such judgment might have been collected. So long as the creditor, his attorney and agents, do no affirmative acts tending to mislead the debtor, and prevent him from protecting his property from sale, or redeeming real estate if sold, there is no ground for importing fraud, and charging the consequence thereof upon the creditor or purchasers at sales. But, as above stated, the finding of fact cannot be reviewed in this court. There is no exception that there was no evidence thus presenting it as a question of law, and it is not claimed, nor can it be, that it may be reviewed in this court as a question of fact upon the weight of evidence.

The general term might, and perhaps would, have reversed this finding of fact, had it not adopted the erroneous conclusion that the execution was void, not having been issued by the clerk; but this court has no means of knowing this. It is concluded by the record as it is. The appellant should have procured from the general term a reversal of the finding of fact, if that was its conclusion, before appealing to this court; and then it would have appeared that the judgment was based solely upon the ground that the execution was void, and then the reversal of the judgment now would have followed. But as the record now stands, the judgment must be affirmed.

All concur in result.

A majority held that the statute does not require the execution in such a case to be issued by the county clerk.

Affirmed.

Moody agt. The Mayor.

SUPREME COURT.

MOODY agt. THE MAYOR, &c.

An owner of real property is liable for injuries caused to third persons by its defects, notwithstanding the premises are at the time in possession of a tenant, if the defects existed when the tenant took possession.

General Term, May 6, 1865.

Before CLERKE, SUTHERLAND and INGRAHAM, Justices.

CLERKE, J. None of the cases cited by the counsel for the defendant are available for him. On the contrary, *Cheetham agt. Hampson* (4 Term. R. 318) is against him. A case (*Rosewell agt. Prior*, Salk. 460) was cited by couusel, to show that an action was maintained against the owner of premises, who was not in possession, for a nuisance in making an erection which stopped ancient lights. BULLER, J., in delivering his opioion in *Cheetham agt. Hampson*, refers to *Rosewell agt. Prior*, and remarks that it was very distinguishable from the case then under consideration. "For there," he says, "the owner let the premises with the nuisance complained of, which had been before erected upon them."

The injury to the plaintiff in the present case arose, not from any want of repairs arising out of the use, but from the defective construction and dangerous condition of the pier. The defendants, the owners, let the pier "with the defects complained of," and are, consequently liable for the injury sustained by the plaintiff.

There should be judgment for the plaintiff on the verdict, with costs.

SUTHERLAND and INGRAHAM, Justices, concurred.

NOTE.—The case of *Little agt. Denn*, ante, page 68, we are informed should not have been reported; as at that term (June, 1864), the judges of the court of appeals were equally divided on the case, and a re-argument was ordered, and afterwards, at the January term, 1866, upon such re-argument, the jndgment of the supreme court was reversed, and the case as thus decided is reported in 34 N. Y. R. 452. Through some mistake probably, Judge JOHNSON's opinion was published in the newspapers, from which we took it as an unreported case.

The case of *Batterman agt. Finn*, ante, page 108, is a dissenting opinion, instead of the opinion of the court, which is reported 32 Hme. 501.—REP.

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UNITED STATES DISTRICT COURT.

IN THE MATTER OF HENRY BERNSTEIN, an involuntary bankrupt.

The lien of a levy made under an execution issued on final judgment obtained in a state court, before the filing of a petition of a creditor to declare a debtor an involuntary bankrupt, is preserved by the bankrupt act, and is to be respected by the United States District Court, sitting in bankruptcy, whether the said court takes to itself the administration of the property on which the lien is imposed, and applies it towards the satisfaction of the lien, or whether it allows the state officer who is executing the process of the state court to do so.

But it must appear that the judgment and execution of the state court are obtained *bona fide*, and without collusion with the debtor.

In Bankruptcy, December Term, 1867.

Before Hon. SAMUEL BLATCHFORD, District Judge.

THIS question arose on a motion made by Wilmerding, Hoguet & Co., execution creditors of Henry Bernstein, a debtor declared to be an involuntary bankrupt, on the petition of certain of his creditors to set aside an injunction granted under the 40th section of the bankrupt act, restraining the sheriff of the city and county of New York from selling certain goods of the bankrupt, which he had levied on and advertised for sale, and was about selling, when the injunction was served on him, under and by virtue of an execution directed to said sheriff, on a judgment obtained by said Wilmerding, Hoguet & Co., against the above bankrupt, in the supreme court of the state of New York. The application was made as well by and on behalf of said sheriff, who had incurred a large amount of charges and expenses in custody, &c., of the goods, as on behalf of the said judgment creditors. Pending the application to dissolve, the court modified the injunction so as to permit the sheriff to sell.

The facts of the case are stated in the opinion of the court.

D. McMAHON, counsel for the execution creditors, and for the sheriff of New York.

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There is no dispute as to this fact, namely, that Wilmerding, Hoguet & Co. had obtained a *bona fide* judgment, execution and levy, and were proceeding to sell, a month before the commencement of these bankruptcy proceedings, which judgment, levy and execution were not by the procurement of or collusion with the debtor, but were vigorously opposed by him.

Is that lien divested by these proceedings? We say not, and hence this application.

The sections of the bankrupt act having any bearing on the subject are:

Section 14, which speaks of the title of the assignee, says, the title to all such property, real and personal, shall vest in said assignee, *although the same is then attached on mesne process, and shall dissolve any such attachment made within four months next preceding the commencement of said proceedings.*

It nowhere in this section divests any lien acquired by virtue of a levy under final process. The case at bar is a lien by judgment execution and levy. The distinctions between *mesne* and final process are familiar to the law for centuries. An execution was always final process.

Section 21 provides, that no creditor whose debt is provable, under this act, shall be allowed to prosecute to final judgment any suit in law or in equity therefor, against the bankrupt, until, &c.; evidently implying that no interference shall be had with judgments already obtained, until final discharge.

Section 35 provides, that if any person, being insolvent or in contemplation of insolvency, within four months before filing the petition by or against him, with a view to give a preference to any creditor, &c., procures any part of his property to be attached, sequestered or seized on execution, &c., the person receiving such payment, pledge, assignment, transfer or conveyance, or to be benefitted thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, &c., is made in fraud of the provisions of this act, the same shall be void.

The papers served on the execution creditors' behalf, on this motion, as well as the efforts made by Bernstein to discharge the attachment and set aside the judgment, negative any collusion or procurement by the judgment creditors. In fact, the proceedings to judgment, in the case of *Wilmerding, Hoguet & Co. agt. Bernstein*, were warmly contested.

The 25th section provides for sale of property as perishable, by assignee or by the messenger under the order of the court. By analogy, where property is advertised for sale under execution by a sheriff, and this court in bankruptcy enjoins him, we submit that such injunction may be modified so as to allow the sale to take place, on the ground of the perishable nature of the goods.

Storm agt. Waddell (2 Sandf. Ch. 494). This was a decision under the former law. It was held, an assignee takes the property of a debtor subject to the lien of a creditor whose creditor's suit was commenced before proceedings in bankruptcy.

Section 39, which is the one that provides for involuntary bankruptcy, allows the proceedings as against debtors, who,

1st. Depart from, &c., with intent to defraud creditors; or,

2d. Who, being absent with such intent, remain absent;

3d. Who shall conceal himself to avoid service of process in an action to recover a debt provable under the act;

4th. Who shall conceal and remove any of his property to avoid its being attached, taken or sequestered on legal process; or,

5th. Shall make any assignment, gift, sale, conveyance or transfer of his estate, &c., with intent to delay, defraud or hinder his creditors, or,

6th. Who has been arrested or held in custody, under or by virtue of *mesne* process

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of execution, issued out of any court of any state, district or territory, within which the debtor resides or has property—such *mesme* process of execution founded on a demand, provable under this act, exceeding \$100; such process remaining in force, &c., for a period of seven days: or,

7th. Who has been *actually imprisoned* for more than seven days, in a civil action founded on contract for the sum of \$100 or upwards; or,

8th. Who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall

(a.) Make any payment, gift, grant, sale, conveyance or transfer of money, property, estate, right or credits;

(b.) Or give any warrant to confess judgment;

(c.) Or procure or suffer his property to be taken on legal process, with intent to give a preference to one or more of his creditors, or to any person or persons his indorsers, bail, sureties, or otherwise; or,

9th. With the intent, by such disposition of his property, to defeat or delay the operation of this act; or,

10th. Who, being a banker, merchant or trader, has fraudulently stopped or suspended payment, and not resumed payment of his commercial paper within a period of fourteen days.

This section further provides, that if such person shall be adjudged a bankrupt, the assignee may recover back the money or other property so paid, conveyed, sold, assigned or transferred, contrary to this act; provided, the person receiving such payment or conveyance had reasonable cause to believe that a fraud on the act was intended, or that the debtor was insolvent; and such creditor shall not be allowed to prove his debt in bankruptcy.

A careful inspection of this section, which is the foundation of all proceedings for compulsory bankruptcy, shows that the case of a *bona fide* creditor, who has by due diligence acquired a *prior lien* on the personal property of the debtor, by judgment and execution, is not within the act; nor is the *bona fide* procuring of such judgment, and the acquiring of such lien by execution, ground for involuntary bankruptcy. It is only in the case where the debtor has procured or suffered his property to be taken on legal process, with intent to give a preference to a credit.

This could not be predicated of this case, which is one of contest of the creditors, Wilmerding, Hoguet & Co., with the alleged bankrupt.

Judge BENEDICT has lately had this point before him, in the case of Jeremiah G. Wilbur, a bankrupt. It arose on a motion made in behalf of certain judgment creditors of the bankrupt, to dissolve an injunction restraining them from proceeding to collect on execution the amount of certain judgments which they had obtained in a state court, and upon which execution had been issued and a levy made upon certain personal property, prior to the filing of the bankrupt's petition.

The learned judge says: "It is clear upon principle, and also, as I think, from the general scope of the provisions of the bankrupt act, that any rights which these judgment creditors have acquired in the personal property in question, by reason of their levy made prior to the filing of the bankrupt's petition, are to be preserved to them, and cannot be destroyed by the subsequent proceedings in bankruptcy." He further proceeds and discusses the power of the district court to assume possession and control of the property levied on by the sheriff, prior to the proceedings in bankruptcy, and says: "It is a question not free from difficulty. But if such a power exists, it is to be exercised with caution, and not to be resorted to unless it appear necessary to protect some substantial right or prevent injustice."

We therefore claim:

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First. That this court, under the involuntary clause, has no jurisdiction over the present case, as against Wilmerding, Hoguet & Co.'s prior lien; because,

1st. They, the said named creditors, in the vigilant and *bona fide* prosecution of their legal remedies, had acquired a prior right to and lien on the property of the debtor, by judgment, execution and levy, prior to the proceedings under the 39th section.

D. McADAM, counsel for the petitioning creditors, canvassed at length the various clauses of the act, and referred to analogous provisions under the original bankrupt act of 1802. He contended that the execution creditors had acquired no priority over the petitioning creditors.

Mr. LEVY was heard as counsel for the bankrupt.

Per curiam, BLATCHFORD, J. The firm of Wilmerding, Hoguet & Co. obtained a judgment against the bankrupt on the 21st of October, 1867, for \$2,930 30-100, in a suit in the supreme court of New York, for a money demand on contract, founded on two promissory notes made by him, and on a sale and delivery of goods to him. The suit was commenced on the 25th of September, 1867, and the judgment was obtained in due course by default after personal service of a summons. On the same day on which the judgment was obtained, an execution was issued thereupon to the sheriff of the city and county of New York, and he made a levy thereunder on a stock of goods in the store of the bankrupt, in the city of New York. The goods were advertised for sale by the sheriff, for the 28th of October, 1867; but the sale was stayed by the state court, and a motion was made by the bankrupt in that court to set aside the judgment, execution and levy, but the motion was denied.

On the commencement of the suit in the state court, an attachment was issued on it, under which the same stock of goods above mentioned had been attached. A motion was made by the bankrupt in the state court to dissolve that attachment, which motion was heard at the same time with the other motion before mentioned, and was also denied.

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After the denial of these motions, the sheriff advertised the goods for sale for the 22d of November, 1867.

On the 21st of November, 1867, the petition in this matter, praying for an adjudication of bankruptcy, was filed; and this court, under the 40th section of the bankruptcy act, at the time it made an order to show cause why the prayer of the petition should not be granted, issued an injunction restraining the sheriff from selling the goods under the execution on the levy made. There has since been an adjudication of bankruptcy in this matter.

In a representation that the goods levied on were of a perishable character, and were deteriorating in value, this court made an order modifying the injunction so as to permit the sheriff to sell the goods under the execution, and directing the sheriff to hold the proceeds until the further order of this court concerning the same.

The plaintiffs in the judgment now move the court to dissolve the injunction wholly, and to allow the proceeds of the sale to be applied in paying the judgment and the costs, and the charges and fees of the sheriff.

There is nothing shown to impeach the *bona fides* of the judgment, execution and levy; no collusion in regard to them appears, and the bankrupt resisted them to his utmost. The lien of a levy made under an execution issued on a final judgment, such as is that in the present case, provided such lien attached before the commencement of the proceedings in bankruptcy, is preserved by the bankruptcy act, and is to be respected by this court, whether this court takes to itself the administration of the property on which the lien is imposed, and applies it towards the satisfaction of the lien, or whether it allows the state officer who is executing the state process to do so. In this case, the property has been sold, and the proceeds of it are in the hands of the sheriff. No advantages can result from requiring the money to be paid into this court, with a view to its application by this court in satisfaction of the lien on the property.

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An order will be entered allowing the sheriff to apply the proceeds of the sale of the property towards the discharge of the amount which he is required by the execution to make, including his charges and fees thereon, and directing him to pay the overplus, if any, to the assignee of the bankrupt, if there be one, and if there be none, then to the clerk of this court, to the credit of the bankrupt's estate.

COURT OF APPEALS.

THE PEOPLE *ex rel.* ERNEST FIEDLER, appellant agt. JAMES MEAD, supervisor, &c., and others, respondents.

This court adheres to the law as laid down by it in the case of *Starin agt. The Town of Genoa* (23 N. Y. R. 438), and in this case (24 N. Y. R. 114), that the relator (plaintiff) cannot maintain an action upon these bonds against the town of Genoa, issuing them, even if a *bona fide holder*; although a contrary ruling has been made by the supreme court of the United States, which has held that these bonds, in the hands of a *bona fide holder*, are legal and valid obligations of the town issuing them, and can be enforced.

These bonds and the coupons are the foundation of the relator's claim, and they being invalid, for reason that it appeared that the assent of two-thirds of the resident persons taxed in the town of Genoa, as appearing on the assessment roll, had never been obtained, as required by the act, the relator's right fails; and he, having no right to any money, has no right to a mandamus to compel anybody to do any act to enable him to maintain it.

January Term, 1867.

THIS is an appeal from the judgment of the general term, affirming a judgment of the special term denying a writ of mandamus. The alternative writ was issued in September, 1856, and the issues of fact formed was tried at the Cayuga Circuit in January, 1858, before Mr. Justice WELLES, who directed judgment for the plaintiff.

This judgment was affirmed at the general term, but on appeal to this court was reversed:

The cause was re-tried at the Cayuga Circuit in 1863, before Mr. Justice WELLES, without a jury, and the justice

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rendered judgment in favor of the defendants, which on appeal was affirmed at the general term, and the relator now appeals to this court.

A peremptory mandamus was awarded, requiring the defendants, as the supervisor and railroad commissioners of the town of Genoa, in Cayuga county, to pay to the relator, \$560, alleged to be due him from the town of Genoa, for interest upon eight obligations of said town for the payment of \$1,000 each, held by the relator, which interest fell due on the first day of January and the first day of July, 1856, and for which the relator holds coupons attached to the principal obligations. The obligations purport to have been issued pursuant to an act of the legislature passed in the year 1852, entitled "an act to authorize any town in the county of Cayuga to borrow money for aiding in the construction of a railroad or railroads from Lake Ontario to the New York and Erie or Cayuga and Susquehanna railroad" (ch. 375). They are in the form of corporate or municipal bonds, except that no seal was attached to them; and they are payable to Ashbel Avery, or bearer. The coupons are in the form of due bills, payable to bearer, and there is one for each half year's interest.

T. R. STRONG, *for appellant.*

D. PRATT, *for respondents.*

DAVIES, Ch. J. The case of *Starin agt. The Town of Genoa* (23 N. Y. R. 439), and the decision of this case by this court (24 N. Y. 114), definitely settled that no action could be maintained upon these bonds against the town issuing them, even by a *bona fide holder*. A contrary ruling has been made by the supreme court of the United States, and it has held that these bonds, in the hands of a *bona fide holder*, are legal and valid obligations of the town issuing them, and can be enforced. We must adhere to the law as laid down by this court in the two cases referred to, and therefore hold

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that this plaintiff cannot enforce these obligations against the town. A majority of this court, on the previous hearing of this case, held that the writ of mandamus asked for by this relator, to compel these defendants to apply to the county treasurer of the county of Cayuga, for the moneys received by him and in his hands, levied and collected for the purpose of paying the interest upon the bonds issued by the town of Genoa, ought not to have been issued. The judgment of the supreme court, awarding the writ, was reversed by this court, on the ground that it was not shown that two-thirds of the resident taxpayers of the town had signed the written assent to the issuing of the bonds, as required by the act authorizing such issue, and that the affidavit relied upon did not supply that defect of proof.

The judge who tried this action the second time has found as facts, that the written assent of two-thirds of the resident persons taxed in said town of Genoa, as appearing on the assessment roll of said town made next previous to the transfer of said alleged bonds of the said railroad company, as aforesaid, has never been obtained by the said supervisor and commissioners, or either of them, nor by any other person or persons, corporation or body politic, in their behalf, or in behalf of any one or more of them, to the effect that such supervisor and commissioners had power to do the act authorized by said act of the legislature, therein referred to, as provided in and by the first section thereof; and that the written assent of two-thirds of the resident persons taxed in said town has never been obtained by any supervisor and commissioners of said town of Genoa, or by any or either of them, nor by any other person or persons, corporation or body politic, in their behalf or the behalf of any or either of them, as provided and contemplated by the said first section of said act.

That before said alleged interest warrants or coupons became due, as hereinbefore stated, a sum of money equal to and sufficient to pay the same, when they should become due

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and payable respectively as aforesaid, had been levied and collected, as in said writ is stated and set forth, but against the report of the supervisor of said town of Genoa, and against his vote, and the same had been paid to the treasurer of the county of Cayuga, for the purpose of paying the said interest warrants or coupons so becoming due and payable on the first days of January and July, 1856; and that the said defendants, although often requested so to do, have hitherto, and still do, refuse to receive the said moneys from the said county treasurer, or to pay the same, or any part thereof, to the said relator, or to cause or to allow the same to be paid; and the said county treasurer still holds the said last mentioned moneys, and is ready to pay the same to the said defendants upon request and upon receiving a proper voucher or vouchers for said payment.

The facts now found by the court, in the re-trial of this action, are certainly not more favorable to the relator than those before this court on the former hearing. It may with truth be said, that in all essential particulars they are identical.

We do not think it seemly to review and reverse the former judgment of this court in this action, upon the same facts. This court solemnly adjudicated, that a mandamus had been improperly awarded by the supreme court to these defendants.

We are now asked to do the same thing which was then refused, upon the same state of facts, which, if done, would be a reversal of the previous judgment of this court in this transaction. We cannot do this. It is claimed that we should now award this writ, to harmonize or conform to the decision of this court in *Murdock agt. Aiken* and *Ross agt. Curtiss* (31 N. Y. 606), decided since this case was before this court on the previous occasion. An examination of the opinions in these cases will show that there is nothing in them conflicting with the cases of *Starin agt. Town of Genoa*, and the judgment of this court in this action. The cases in

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31 N. Y. were actions against certain officers who had received moneys and had the sums in hand, for the purpose of paying the interest due on certain coupons held by the plaintiffs in these actions.

It was said, in *Murdock agt. Aiken*, that the defendant in that action had received the sum of money claimed for a specific purpose, named to pay the interest due, or to become due, to those holding the bonds of the town. If the town thought proper, as it did, through the instrumentality of the law and by the collection and payment of this money to the defendants in that suit, to concede its liability to pay this interest money, it was not for them to set up that such action on the part of the town was illegal, and that the bonds so issued by the town were illegal and void. This was not a question which those defendants were in a position to agitate. It was competent for the town to pay the interest on the bonds, although their collections could not have been enforced at law, and the trustee who had received the money for such purpose could set up that the debt was illegal.

In *Ross agt. Curtiss*, it was said that it was idle for the defendant to say that he had a right to exercise any discretion whether he will pay the money or not, or to inquire whether the board of supervisors of the county had legally raised the money, or whether the bonds were legally issued. That was no part of his duty. The statute directed him absolutely to pay the money to the holders of the bonds issued by the towns, for the interest which should then have accrued. He had nothing else to do but to pay the same in the manner directed. If so, his only duty was to ascertain who were the real owners of the bonds issued, and to pay to them the money so placed in his hands for that purpose. That was the extent of his authority; and when he undertook to review the legality of the acts of the board of supervisors in raising the money, or of the officers authorized to issue the bonds, he exceeded his powers, and assumed to do

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acts for which he had no authority. An agent has never a right to review the legality of acts done by his principal; but where he receives money to apply as directed by the principal, he has no other duty but to comply with such orders.

It was claimed, on the argument of *Ross agt. Curtiss*, that this case differed from that of *Murdock agt. Aiken*. The answer to this suggestion was, that that case was an application for a mandamus to compel the officers who had money raised by tax, to pay the same to the object for which it was provided, and the decision of the court was that a mandamus was a proper remedy.

The questions which were decided in *Murdock*, and in *Ross agt. Curtiss*, did not properly arise in *The People agt. Mead*. The latter case was decided in the same manner as if the action had been against the town, and the same ruling adopted as in the case of *Starin agt. Town of Genoa*, and *Gould agt. Town of Sterling*; and the decision of this court in *Ross agt. Curtiss* was put distinctly on the ground that the defendant in that action had no right to litigate the question which arose in this action, and in the two cases above referred to, reported in 23 N. Y. R. The liability of the defendant was put solely on the ground that "he received the money under the statute for the sole purpose of paying this interest, and he has no power to avoid the discharge of that duty by alleging illegality in the acts of the body from which he receives the money and authority to pay it."

This examination of these cases show that there is no conflict in the views expressed in them, or the points adjudicated therein, and that this court has so held and declared. It is thus seen that the two cases decided by this court since this present action was under review by it, announce no new doctrine, or any new principle that conflicts with the opinions there expressed.

We see, therefore, no reason for a departure from the views then enunciated, and it follows that the judgment of

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the supreme court now appealed from, being in harmony with the opinion of this court, should be affirmed with costs.

All concur. Affirmed.

GROVER, J. It was not contended upon the argument but that a mandamus was the appropriate remedy in this case, if the plaintiff was entitled to any. That is too plain for discussion. But for the previous adjudications of this court, I should have held that the affidavit filed with the clerk of Cayuga county, pursuant to the second section of chapter 375 of laws of 1852, was conclusive evidence of the assent of the taxpayers of the town, required by the act in favor of a *bona fide* holder of bonds issued under its provisions. But those decisions have settled the law of this state otherwise. (*Starin agt. The Town of Genoa*, 24 N. Y. 439; *The People ex rel. Fiedler agt. Meade*, 24 N. Y. 114.) The affidavit must, in accordance with these decisions, be regarded as furnishing no evidence upon that point. The finding of the judge, that an assent of two-thirds in number of the taxpayers was not given, was correct, as this fact was not proved by evidence other than the affidavits. The bonds must be held to have been issued without any power, and, therefore, as possessing no validity. These conclusions are the necessary result of the cases cited *supra*. The relator has no legal demand against the town, nor any title to the money in the county treasury, which by this proceeding he is endeavoring to reach. I do not, therefore, see upon what ground he is able by mandamus to compel the officers of the town to do acts to enable him to obtain money belonging to the town, to which he has no claim. If he can compel in that way these officers to go to the county treasurer, and get the money and pay it over to him, I do not see why he might not, in the same way, compel the board of supervisors to levy the tax upon the town, necessary to pay not only the interest but the principal. These defendants owe no duty to the plaintiff, because he has no title to the money.

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It is insisted that *Ross* agt. *Curtiss* (31 N. Y. 606) and *Murdock* agt. *Aiken*, decided by this court (not reported), show that the plaintiff is entitled to the money raised by the town for the purpose of paying the interest upon the plaintiff's bonds. These were actions brought by the holders of bonds against the officers of the town, to recover moneys in their hands, which they had received for the express purpose of paying the same to the plaintiffs, to be applied thereon.

Judgment in each case was given for the plaintiff, upon the plain, familiar principle, that an agent or trustee, receiving money to be paid over to his principal or *cestui que trust*, is not permitted to dispute the right of the party for whose benefit he received it, and cases establishing this doctrine were cited by the court. But this does not show that the court, by mandamus, at the suit of a party having no right, will compel an officer to go and demand and receive from another officer money, and pay the same over to him. The plain answer is, you have no right to the money, and therefore the defendant owes no duty to you to perform these acts.

In *Elmore* agt. *Ross*, the plaintiff proved a good title to the money by showing it in the defendant's hands, and that it was received by the latter in trust to pay it to him. This established his right as against the defendant. It became necessary to prove the bonds only for the purpose of showing that the defendant received the money in trust to pay the plaintiff. It was wholly immaterial whether the bonds were or were not valid.

Not so in this case. The bonds and the coupons are the foundation of the plaintiff's claim, and these being invalid, his right fails, and he having no right to any money, has no right to a mandamus to compel anybody to do any act to enable him to obtain it.

It is said, if the town does not dispute the plaintiff's title, no one else can. The town has no power to recognize these bonds, or in any manner to raise money to pay them. The

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bonds being invalid, the plaintiff is in the same position he would be if he had no bonds at all, and the money was raised as a donation for him. In such a case, I apprehend no one would insist that a mandamus would lie to compel officers to do acts to enable the plaintiff to get the money. The legislature can, and probably will, relieve the plaintiff, and others similarly situated, upon equitable terms; but I am unable to see how the courts can furnish a remedy without a violation of principle.

The judgment appealed from should be affirmed.

All concur. Affirmed.

PORTER, J., took no part in the case.

COURT OF APPEALS.

THE NEW YORK AND NEW HAVEN RAILROAD COMPANY agt.
MORRIS KETCHUM and EDWARD BEMENT, survivors, &c.

When this case was before this court on a former appeal (34 N. Y. 30), the reversal of the judgment was put on the express ground that the supreme court committed an error in holding that Ketchum's directorship in the company barred the claim of the firm of which he was a member. No new facts were elicited on the re-trial to change the case; consequently the rule of *stare decisis*, if of any value, should be adhered to in this case, when the precise question is again presented in the same court, between the same parties, and upon substantially the same facts.

January Term, 1867.

BOCKES, J. After a careful examination of the case, I am satisfied that this appeal presents no question for our consideration not fully determined by this court when the case was here on the former appeal (34 N. Y. 30).

It must necessarily have been then determined that the pleadings were sufficient to authorize the judgment in favor of Ketchum, Rogers & Bement, to which it was found they were entitled, or the case would not have been sent back to

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the special term for re-trial. The judgment was reversed as to those defendants, and a new trial was granted them, for the reason that they have been improperly denied affirmative relief. If the pleadings were insufficient to authorize it, such relief could not have been improperly denied them, and the judgment should have been affirmed.

But the court came to the conclusion, and held, that, under the pleadings and proofs, the defendants, Ketchum, Rogers & Bement, were entitled to affirmative relief.

The question as to the sufficiency of the pleadings was therefore settled by that adjudication, and is not now open for discussion.

So, also, it was adjudicated on the former appeal, that the fact that Morris Ketchum, one of the firm of Ketchum, Rogers & Bement, was a director in the New York and New Haven Railroad Company, did not deprive the firm of the right to recover against the company by reason of its negligence. This precise question was presented on the former appeal, and was carefully considered by the court, as appears by the elaborate opinion of Mr. Justice DAVIES, whose views were concurred in and adopted by a majority of his associates.

He says: "It seems that the court below denied all remedy to this firm (consisting of Ketchum, Rogers & Bement), on the ground that Ketchum, one of the firm, was a director of the corporation during the entire period of the frauds committed by the transfer agent, and was therefore in some sense chargeable with the consequences, because of the neglect of the board of directors."

He then proceeds to a discussion of the question, and closes by saying:

"In my opinion, it was error to refuse relief to the firm on the grounds above indicated.

Thus it appears that the reversal of the judgment was put on the express ground that the supreme court committed an error in holding that Ketchum's directorship in the company

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barred the claim of the firm of which he was a member. No new facts were elicited on the re-trial to change the case.

It now stands as it stood when here before, in every material particular. If any question was settled by the adjudication on the former appeal, it was this; and if the rule of *stare decisis* is of any value, it should be adhered to in this case, when the precise question is again presented in the same court, between the same parties, and substantially on the same state of facts.

I regard every question which can be raised on this appeal definitely settled in favor of the respondent by the former adjudication. The reasoning of the learned judge who gave expression to the views of the court is conclusive and exhausting. Its completeness should not be marred by any attempt to add suggestions by way of argument or illustration.

The judgment must be affirmed, with costs.

All the judges concurred except PORTER, J., who, having been counsel in the case, expressed no opinion.

All affirm.

SUPREME COURT

JOHN WARREN agt. JOHN McDIARMID.

The collection of wharfage under the act of 1860, April 10, chapter 416 laws of 1860, can only be made in the manner pointed out in the 217th section of the act of April 9th, 1863, which is by a warrant to distrain the goods and chattels found on board of the vessel, for wharfage accrued under section 1 of the said act of 1860, and on the pier or bulkhead, for that accrued under section 3 of same act.

It is not proper to bring an action to enforce such a lien. A receiver will be denied in such an action, even though a case therefor, as well as of wharfage and lien, is made out by the plaintiff.

Kings Special Term, December, 1867.

Before Hon. JOHN A. LOTT, Justice.

THE plaintiff moved for a receiver for a large number of

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hackmatack knees, lying on his dock, situated at the foot of Quay street, Greenpoint, Long Island. The motion was founded on a complaint in which it was averred:

1. That he was lessee and wharfinger of a certain wharf set forth in the complaint, and has been such for six months past.

2. That while he was such, the defendant was the owner of about 1,000 hackmatack knees, which were on the plaintiff's wharf from Nov. 1, 1865, up to February 1, 1866. On or about February 1, 1866, 449 of said hackmatack knees were removed, leaving 551 of the same lot remaining thereon until May 18, 1866. For the first lot and time plaintiff claims a lien on the hackmatack knees to the amount of \$955 80-100, and for the second period on the remaining portion of said knees the sum of \$353 50-100, being for both times and quantities, \$1,309 30-100.

3. On the 18th May, 1866, the plaintiff rendered a bill to the defendant and demanded the pay for the wharfage, which demand the defendant refused to comply with, denying all liability therefor.

4. The plaintiff further shows that no portion of the said knees were merchandise, delivered on a wharf for transportation through the canals, nor landed for storage purposes by the defendant, as owner or occupant of a warehouse immediately in front of and adjoining the said bulkhead, &c., &c., but the same were merchandise owned or in the possession of the defendant, landed by him from vessels consigned to, moored at and unladen on said bulkhead.

5. That the plaintiff is advised it is necessary for him to enforce his lien by action, and he brings this action for that purpose. That the defendant claims that the plaintiff has no lien on the said knees, but is removing them and gradually disposing of them to third parties. The defendant is a man of but little, if any, pecuniary responsibility, and threatens, &c., &c.

Prays injunction and receiver.

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D. McMAHON, for plaintiff, in support of the motion.

First. The plaintiff has a lien for the wharfage or dockage of the said knees. Laws of 1860, page 416, act of April 10, 1860, section 3, provides: "It shall be lawful for the owner or lessee of any bulkhead, pier or basin, in the port of New York, to charge and receive the sum of five cents per ton on all goods, wares or merchandise remaining on the bulkhead or pier owned or leased by him, for every day after the expiration of forty-eight hours from the time such goods, wares or merchandise shall have been left or deposited on such pier or bulkhead, and shall be a lien thereon until paid, excepting merchandise and other property delivered on a wharf for transportation by canal boats through the canals owned by this state, and also excepting such merchandise as may be landed on a bulkhead for storage purposes, by the owner or occupant of a warehouse immediately in front of and adjoining the bulkhead on which such merchandise shall be landed, which may be permitted to remain thereon eight days without being subject to the charge aforesaid. Nothing contained in this section shall be so construed as to conflict with the eighth section of the act to establish regulations for the port of New York, passed April 16, 1857, and amended April 16, 1858."

It will be seen that this section expressly gives a lien on the merchandise in question.

Second. The proper remedy to enforce a lien on the state of facts herein set forth is by action foreclosing such a lien.

(a.) The 7th section of the said act says that the collection of the rates of wharfage established by this act shall be enforced in the manner prescribed in the 207th section of the act of April 9, 1813. The laws of 1862 corrects this number by making same section 217 of act of April 9th, 1813.

(b.) By reference to the 217th section of that act (*Revised Laws of 1813*, p. 430, vol. 2), it is enacted that, where any ship or vessel has lain twenty-four hours at any wharf, and the master or owner refuses or neglects to pay the wharfage as aforesaid, or give satisfactory security for the payment of the same, being thereunto required by the owner or wharfinger, by notice in writing being left on board with the mate or one of the hands belonging to said vessel, it shall and may be lawful for the owner or wharfinger to distrain for such wharfage on any goods or chattels found on board such ship or vessel, and as from time to time, as often as twenty-four hours wharfage shall become due, and the goods and chattels so distrained to sell and dispose of in the same manner as is provided in the case of rent.

It seems to me that, taking the 7th section in combination with the 217th section of the act of April 9, 1813, the legislature did not intend to give the remedy by distress, excepting for such wharfage as is created by the 1st section of the act of April, 1860, for vessels lying at or adjacent to a pier. The remedy by distress, being a very summary one, and against the course of the common law, will not be given, unless clearly intended. But the 2d section of the act of 1860 gives in express language the lien.

(c.) Then the only other question is as to the mode of enforcing such a lien. This can only be done by action brought to satisfy such lien.

Thus in *Fox agt. McGregor* (11 Barb. 41), it was held that an innkeeper's remedy to enforce a lien, for keeping the horse of his guest, is by action in the nature of a bill in chancery. In *Edwards on Bailments* (p. 414), the same principle is also stated; also 2 *Kent's Com.*, 3d ed., 642.

(d.) There are reasons why a party should apply to a court of equity to have a foreclosure of his lien, even though he had the remedy by distress; because:

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1. The remedy by distress is extraordinary. Any mistake in enforcing it renders the wharfinger a tortfeasor.

2. If the wharfinger, as a lien holder, should refuse to deliver the subject of his lien upon demand, accompanied by a tender of the debt, the lien is discharged (*Lamotte agt. Archer*, 4 *E. D. Smith*, 46.)

3. It is essential to an equitable lien that the subject matter be identified. At common law, possession is necessary, and if the possession is lost, the lien is gone. In equity, possession is not essential, but it is essential that the property or fund be distinctly traced. (*Grinnell agt. Suydam*, 3 *Sandf.* p. 132.)

Now, as part of these hackmatack knees have been removed, and the remainder left, it will be a nice question to determine how far and to what amount the plaintiff's lien extends, as well on the property removed as on that which remains.

(e.) The case of *Stearns agt. Marsh* (4 *Denis*, p. 227), distinctly recognizes the right by bill in equity to foreclose the pledge or lien. *Garlick agt. James* (12 *Johns.* p. 146) is to same effect.

(f.) Now, if the plaintiff should issue his distress warrant, and sell the knees without right, his lien is gone, and he is guilty of a conversion. (*Cortelyou agt. Lansing*, 2 *Caine's Cases*, 200; *Dyker agt. Allen*, 7 *Hill*, 497.)

This doctrine undoubtedly would apply if he sold to a greater extent or for a greater claim than he was entitled. He should not, therefore, be compelled to resort to a remedy of distress. The proceeding by action should be allowed, as a concurrent remedy with that of distress.

Third. A receivership is proper, we submit, in such a case as this.

(a.) The action is commenced.

(b.) An injunction has been obtained, restraining the defendant from interfering with the property or removing the same pending the litigation. It is necessary, therefore, to have a receiver, as one remedy is correlative with the other.

(c.) The plaintiff, in his papers, shows that the defendant is removing and disposing of the knees in question. Every disposition of them to a *bona fide* purchaser has an effect either to discharge or obstruct the plaintiff's lien.

Section 244 of the Code provides, in effect, in the first subdivision, that a receiver may be appointed before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action, and which is in the possession of an adverse party, and the property or its rents and profits are in danger of being lost or materially injured or impaired.

Fourth. On the application for a receivership, the merits are not inquired into. Such motion relates only to the preservation of the property in controversy. (4 *Wend.* 173; 2 *Barb.* 533.)

C. & T. PERRY, for defendant, contra.

LOTT, Justice. Motion denied, with \$10 costs to abide the event. Assuming that the plaintiff is entitled to wharfage, and to a lien therefor, I am of the opinion that an action is not a proper remedy. The 7th section of chapter 254 of the laws of 1860 has reference to all the rates of wharfage established here by the act, as well as the rate fixed by section 3 as by the first section. It, as subsequently

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amended, provides that the collection thereof shall be enforced in the *manner* provided in the 217th section of the act of 9th April, 1813, which is by distress of the goods and chattels found on board of the vessel, for wharfage accrued under section 1, and on the pier or bulkhead for that accrued under section 3; and it may be wherever found, but as to that I express no opinion.

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N. Y. SUPERIOR COURT.

CONRAD W. ROSE agt. UNITED STATES TELEGRAPH CO.

An agent or broker cannot maintain an action against a *telegraph company*, for damages arising from an error or mistake made by the company in transmitting a message from his principal to him, where he acts under the message in the name of and for his principal.

Heard May General Term, 1867.

Before MONELL, GARVIN and JONES, Justices.

APPEAL from a judgment.

In August, 1865, Tack Brothers & Co., residing and doing business in the city of Philadelphia, delivered to the defendants, at their office in *that city*, a telegraphic dispatch, addressed to the plaintiff at the city of New York, directing him to contract to sell for them *five hundred* (500) barrels of petroleum, at fifty-one and a half cents a gallon, deliverable from September first to September fifteenth, sellers' option, and requested an immediate reply.

The defendants transmitted the telegram in all respects as it was written, except that, as delivered to the plaintiff, it was written "*five thousand barrels*," instead of "*five hundred barrels*." On delivery of the telegram, the defendants demanded of and the plaintiff paid to the defendants the sum of seventy-five cents therefor. Within an hour of the receipt of the telegram, and in pursuance of it, the plaintiff made contracts

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with different persons to sell and deliver to them five thousand barrels of petroleum, deliverable at the option of the sellers, from September first to September fifteenth, at fifty-one and a half cents a gallon. Thereupon the plaintiff forthwith sent a telegram to Tack Brothers & Co., stating that he had made such contracts, and received a reply that in the dispatch which they had sent they had directed the sale of five *hundred*, and not five *thousand* barrels, and they refused to furnish or deliver any greater number than five *hundred* barrels, and also refused to ratify any of the contracts made by the plaintiff in excess of the number mentioned in their dispatch. After the contracts were made, and before the error in the dispatch was discovered, the price of petroleum advanced one and a half cents a gallon, and on the fifteenth of September had advanced to fifty-eight and a half cents a gallon. The plaintiff *claimed* that he was liable upon his several contracts to the parties concerned, and demanded judgment against the defendants for a sum which should cover such liability, and also his commissions.

On the trial before Mr. Justice JONES and a jury, it was proved that the plaintiff had paid two bills, amounting together to \$2,700, for the difference, as expressed in "*oil bought of Messrs. Tack Bros. & Co., of Philadelphia, August 26, 1865.*

The defendants moved for a nonsuit on several grounds. The motion was denied, and they excepted.

Upon the facts as proved, the court instructed the jury to find a verdict for the plaintiff for the difference between the contract and market price of the petroleum, and also for his commissions, the amounts of which were agreed upon.

The defendants excepted and appealed.

G. P. LOWREY, *for appellants.*

J. E. PARSONS, *for respondent.*

By the court, MONELL, Justice. It does not appear that

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the contracts made by the plaintiff, for the sale of five thousand barrels of petroleum, were put in evidence on the trial. It, therefore, does not appear in whose name the contracts were made. There is no allegation in the complaint that the plaintiff made the contracts in his own name; and if anything can be inferred from the tenor of the receipts taken on settling the contracts, the sales were made either in the names of Tack Brothers & Co., or their relation as sellers was disclosed to the purchasers.

I am not prepared to say that, irrespective of a liability arising purely on contract, a telegraphic company may not be responsible to a third person for the injurious consequences of an error in transcribing and transmitting a telegraphic message to such third person. If, upon the faith of a message thus communicated, the receiver enters into contracts or makes engagements which result in loss to *himself*, which loss is wholly occasioned by errors in the message as transcribed and sent, and which errors were negligently made by the telegraphic company, it would seem that a liability should attach, not on the ground of a violation of a contract, but of the violation of a duty, the faithful discharge of which the company had undertaken. A mere gratuitous offer to perform a service for another imposes no legal obligation to perform such service; but if performance is undertaken, and it is done negligently, or without due care, so that an injury ensues, an action will lie by the person injured. (*Thorn agt. Deas*, 4 J. R. 84.) Upon principle, therefore, analogous to the case last cited, *any person* injured by the negligence of a telegraphic company in transmitting a message, although neither a party or privy to any contract with such company, can sustain an action for his damages; for, where "one does a legal act in such a careless and improper manner that injury to third persons may probably ensue, he is answerable in some form of action for all the consequences which may directly and naturally result from his conduct." (*Vandenburgh agt. Truax*, 4 Denio, 464.)

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It is not claimed in this case that the plaintiff was either a party to, or that there was any privity of contract between himself and the defendants. Their contract was with Tack Brothers & Co., and for a breach of such contract they are liable only to the latter, and the right, therefore, to maintain this action by the plaintiff, rests solely upon the principle before stated, of a wrong and an injury; and to bring himself within the principle, he has endeavored to show that, in legal contemplation, he was the injured party.

The case shows that, upon being informed of the contracts to sell *five thousand barrels*, Tack Brothers & Co. refused to ratify such contracts, or to furnish or deliver any greater number than five hundred barrels; upon which the plaintiff, *assuming his liability to the purchasers of the five thousand barrels*, closed the contracts, paying to the purchasers the difference between the market and contract price.

If the plaintiff was correct in such assumpsit of liability, he can doubtless sustain this action.

All the parties to the transaction, immediately connected with the error of the telegraph company, held the relation of principals and agents. Tack Brothers & Co. were the common principals, in Philadelphia, who desired to sell; the defendants were their agents, authorized to transmit their instructions to the plaintiff, who, as their broker, was directed to sell; and nothing in any of the subsequent transactions of the parties changed such relations of principals and agents. The plaintiff, therefore, acting as the broker of Tack Brothers & Co. to negotiate a sale, not having the property in his possession, could not, by making sales in his own name, affect their rights as sellers (*Story on Sales*, § 85); for nothing is better settled than that a principal is entitled to the same rights and remedies against the purchaser, whether the contract be in his name or in the name of his broker (*Story on Sales*, §§ 88, 89); and hence, so far as such rights and remedies go, it is not material whether the sales in this case were made in the plaintiff's name or in the names of the principals, as in either

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case they were the contracts of Tack Brothers & Co., and not of the plaintiff, *qui facit per alium, facit per se*. For, says PARSONS (*Pars. on Cont.* vol. 2, 250), a "broker, being one to whom goods are not entrusted, and who usually and properly sells in the name of his principal, and who is understood to be only an agent, *whether he sells in his own name or not*, stands only on the footing of an agent." It does not, however, by any means follow, that an agent who does not disclose his principal is not liable to the person with whom he contracts. If he conceals his character of agent, he then becomes a principal, and individually liable upon his contracts; but the party dealing with him may, when he discovers the principal, charge either, at his election. (*Becbe agt. Robert*, 12 Wend. 413.)

But I do not propose to pursue this branch of the subject further; for it does not appear that the plaintiff made the contract in his own name, and it does sufficiently, I think, appear that he disclosed his principals, and thereby relieved himself from personal responsibility.

It is not, then, disputed that the plaintiff was the mere agent of Tack Brothers & Co., and was acting for them and on their behalf. Nor can it be disputed that, having disclosed his principals, they, and not he, were liable upon any contracts which he made in pursuance and within the scope of his agency.

The principals in Philadelphia, in prosecuting their business, and in communicating with their agent in New York, employed the defendants to transmit their message. Upon receipt of the message, the agent, obeying his instructions and disclosing his principals, made contracts for the sale of five thousand barrels of petroleum. Can it be successfully contended that the principals were not liable on such contracts, merely (and there can be no other reason) because the defendants, their agents (*quasi* at least), had negligently transmitted their message, and by a mistake directed a sale of a larger quantity than was intended? I think not. A

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vendor is bound by all the acts of his broker done within the limits of his authority (*Story on Sales*, § 90); and it can make no difference whether the authority proceeds directly from the principal, or indirectly through another agent.

Suppose Tack Brothers & Co. had directed one of their clerks to communicate to the plaintiff by letter, to sell *five hundred* barrels, and the clerk had negligently written *five thousand* barrels, and the plaintiff had contracted to sell the latter number, would not such be the contract of and binding upon Tack Brothers & Co.? Clearly it would. Nor is there any difference in the two cases. The authority to the agent, coming through the telegraph company, or through the clerk, so far as the protection of the agent is concerned, is the same. Whatever errors or mistakes were committed by the medium employed by the principals to transmit their instructions to their agent, can in no way, it appears to me, affect either the duty or the rights of such agent literally to obey their injunctions, and to throw all responsibility from himself upon them.

Not only were the contracts made by the plaintiff obligatory upon his principals in Philadelphia, to the full extent of *five thousand barrels*, but, in like manner; such principals were liable to the plaintiff for his accustomed commissions and expenses (including the seventy-five cents paid for the telegram) in effecting the sale, and which could have been recovered in an action for such purpose. Any payment, therefore, made by the plaintiff, in settlement of the contracts, was voluntary, and was made merely on behalf and for the benefit of Tack Brothers & Co., and does not give any right of action whatever to him against these defendants; his only remedy being, if any, against his principals, to recover for money paid.

In *Wash'g and N. O. Tel. Co. agt. Hobson*, in the court of appeals of Virginia (15 *Gratton*, 122), an order to buy *five hundred bales* of cotton was altered to *twenty-five hundred*; and in an action by the sender of the message against the

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company, it was held, he might recover not only his damages, but also the commissions due to his factor.

We were referred to one case only, in opposition to the views I have here expressed. In that case (*N. Y. and W. Print'g Tel. Co. agt. Dryberg*, 35 Penn. 298), the order transmitted was, "Send me for Wednesday evening two *hand bouquets*," which was transmitted two *hundred* bouquets; and it was held, that the *receiver* of the message, having commenced filling the order before the mistake was discovered, could maintain an action. Judge SHARSWOOD, in an opinion delivered below, admitted that, if the company were to be regarded as the agent of the sender, it was clear they were not liable to an action by the receiver. But he did not regard them as such agents, for reasons which to my mind are not very satisfactory. Yet Judge WOODWARD, when the case was up on appeal, said, "that the relation of principal and agent existed between Le Roy (the sender) and the company, there can be no doubt; but I do not think it equally clear that that relation was not established between the plaintiff and the company. Telegraph companies are in some sense public institutions, and I am inclined to think the company ought to be regarded as the common agent of the parties, at either end of the line." But the error in transmitting the message was regarded as a *misfeasance*, and the company held responsible as a *wrongdoer*. The case is unsupported by authority, and is, it seems to me, opposed by well settled principles applicable to the relations of principal and agent; and I cannot therefore, regard it as more than a mere *dictum* emanating, it is true, from a court entitled to much respect, but not binding upon us here.

The examination I have given this question has led me to the conclusion that, treating the mistake of the company as a *misfeasance*, and extending their liability to every person injured by the wrong, which is the extent to which any of the cases go, the plaintiff in this case was not the injured party; that he was not responsible, individually, upon any of the contracts

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he made; that Tack Brothers & Co. were alone liable on such contracts, as also for the plaintiff's commissions and expenses, and that the settlement of such contracts by the plaintiff did not, in contemplation of law, make him the injured party.

I am of opinion the judgment should be reversed and a new trial granted, with costs to abide the event.

I concur, S. W. GARVIN.

I concur, S. JONES.

COURT OF APPEALS.

THOMAS CLARK, respondent agt. THE EIGHTH AVENUE RAILROAD COMPANY, appellants.

When it appears that a passenger is riding upon a railroad car in a place of hazard or danger, his negligence is *prima facie*, proved, and the *onus* is upon him to rebut the presumption.

Where a passenger showed that the inside of the city railroad car was full, and that the platform was full, so that no more persons could stand thereon; that in this situation the car was stopped for him to get on; that while riding there the conductor called upon him and received his fare.

Held, that under such a state of facts, negligence could not be fairly imputed to the passenger for riding in that position.

The law requires of those engaged in the carrying of passengers, the exercise of such care on their part and of their servants, as will insure the safe carriage of their passengers, so far as their safety depends upon the diligence and care of those engaged in such carriage.

If the negligence of the carrier contributes to the injury of the passenger, it is no defense to the carrier, that the negligent act of another (a third person), contributed thereto, if the injury would not have occurred but for the negligence of the carrier.

January Term, 1867.

THE defendants, a railroad corporation, were engaged in 1856, in carrying passengers in cars propelled by horse-power in the streets of New York.

In the fall of that year the plaintiff went on board of one of the defendants' cars for the purpose of being carried therein, and while standing on the step of the front platform

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of the car, was knocked therefrom by a horse and cart coming in contact with him, by which he received some injury. The cause was tried at the circuit in New York by jury.

Upon the trial an exception was taken by the defendants to a refusal of a non-suit by the court, and several exceptions taken by the defendants to the charge of the judge as given, and to his refusal to charge as requested, which, together with the facts, sufficiently appear in the opinion. The jury rendered a verdict for the plaintiff, upon which judgment was entered, and after affirmance upon appeal by the general term the defendants appealed to this court.

A. J. PARKER *for respondent.*

J. W. ASHMEAD *for appellants.*

GROVER, J. The defendants' counsel, at the close of the plaintiff's case, moved for a non-suit upon the grounds that the plaintiff had failed to show that the injury was received without negligence on his part contributing thereto; also, that the evidence showed that his negligence did so contribute, and upon the further ground that the evidence failed to show any negligence in the defendants or its servants. The negligence alleged against the plaintiff was, that at the time of receiving the injury he was standing on the steps of the front platform of the car; it appearing that he would have escaped the injury had he been either inside of the car or upon the platform.

In the absence of any explanation, I should have no hesitation in saying that this position of the plaintiff, at the time of the injury, proved that he was negligent, and that it would have been the duty of the court to non-suit. When it appears that a passenger is riding upon a car in a place of hazard or danger, his negligence is *prima facie* proved, and the *onus* is upon him to rebut the presumption. The proof of the plaintiff in the present case, tended to show that the inside of the car was full, and that the platform was full, so

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that no more persons could stand thereon; that in this situation the car was stopped for the plaintiff to get on; that upon getting on there was no place for him except standing on the steps; that while riding in this situation, the conductor called upon him for and received from him his fare. These facts, if true, authorized the jury to find that the plaintiff had been invited, by those having charge of the car, to ride in that place, and that an implied assurance had been given, that that was a suitable, safe place for him to ride. Under such a state of facts, I do not think that negligence can fairly be imputed to the plaintiff for riding in that position. The motion, so far as based upon this ground, was properly denied.

The proof as to defendants' negligence was, that there was a horse and cart on or near the track, the horse more or less unmanageable, in plain view of the driver of the car, who could have stopped his car in two feet, but did not stop and continued to drive on towards the horse upon a trot, until the horse started on towards the car and passed it, bringing either the horse or the cart in collision with the plaintiff, knocking him from the car on to the pavement, thus producing the injury, the car not stopping until the driver was told that a man had been knocked off. I cannot say as a question of law, that this was not negligence. The car must keep on the rails and could not turn off, and thus get out of the way like a common vehicle. Thus situated, to drive up to the immediate vicinity of a fractious horse, not controllable by its driver, attached to a cart, was certainly not so entirely free from danger as to justify a court in withdrawing its consideration from a jury. A minute's further time might have enabled the driver to regain control of the horse, and thus have avoided the injury. The motion for non-suit was, therefore, properly denied. The defendants gave evidence conflicting with that of the plaintiff, as to stopping the car and receiving the fare from the plaintiff, after which he renewed his motion for non-suit, and upon its

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denial excepted. As to this exception, it is only necessary to say, that the legal question was not at all varied by the defendants' evidence; it only created a conflict of testimony which was proper to submit to the jury.

The court among other things, charged the jury, that the defendants and their servants were bound to use great care and caution in carrying the plaintiff, and if free from negligence himself, and injured from want of great care by the defendants or its servants, he was entitled to recover. The defendants excepted to this portion of the charge.

This presents the question as to the degree of care a carrier of persons is bound to exercise. The rule on this subject is so well settled that further discussion or the citation of authorities is deemed superfluous. The law requires from those so engaged, the exercise of such care on their part and of their servants, as will ensure the safe carriage of their passengers, so far as their safety depends upon the diligence and care of those engaged in such carriage, and makes them responsible for any injury sustained from the omission of such care and diligence. It is not a legal error to call this great care, although the expression is not well calculated to convey to the mind of a jury an accurate idea of what care and diligence is required in the transportation of persons. The charge that, if the injury was the result of the combined negligence of the defendants and cartman, there being no fault in the plaintiff, he was entitled to recover, was not erroneous.

If the negligence of the defendants contributed to the injury, it is no defense that the negligent act of another contributed thereto, if the injury would not have occurred but for the negligence of the defendants. The defendants, it is manifest, are only made responsible for the result of its own wrong. That wrong produced the injury, and although it would not have occurred but for the wrongful act of another, that circumstance furnishes no excuse for the defendants, so far as an injured party is concerned.

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The court further charged, that if the plaintiff was permitted by defendants' agents, to ride on the forward platform of the car (step, meaning), he was guilty of no negligence in being there. To this portion of the charge defendants' counsel excepted. Were not this portion of the charge modified by a subsequent portion, I think the exception was well taken. It is the duty of the passenger on getting on board of a car, to place himself in a safe position therein, if he is able to obtain such position, and it is no excuse for him to place himself in an unsafe one, that the persons in charge know that he is unsafe and do not drive him therefrom, when the unsafety is known to the passenger. That riding upon the steps of a street-car is less safe than a seat inside, requires no proof. It is obviously so.

In a subsequent portion of the charge the judge told the jury, that if the plaintiff made reasonable exertions to get inside of the car and failed to do so, and was permitted by the driver and conductor to remain on the platform, he was not illegally there. I understand this portion of the charge as relating to the facts as claimed by the plaintiff, that is, that the conductor assented to his riding there, by receiving fare from him therefor when it was impossible for him to get any other place. So understood, it gave a correct view of the law to the jury. I have examined the other exceptions to the charge, and refusals to charge, and come to the conclusion that none of them were well taken and require no discussion.

The judgment appealed from should be affirmed.

All concurred except DAVIES, not voting.

Affirmed.

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SUPREME COURT.

HIRAM SLOCUM and others agt. CHARLES H. BARRY.

Where an action is brought, and the complaint alleges that the plaintiffs were appointed trustees to receive subscriptions for the benefit of a public corporate institution, and claiming to recover of the defendant, who had signed a general subscription agreement, the amount of his subscription, the plaintiffs are trustees of an express trust, under section 113 of the Code, and are not liable for costs, personally, on the dismissal of the complaint.

An order denying a motion to set aside an execution issued for costs against plaintiffs personally, who claim to act as trustees, is *appealable*.

Albany General Term, March, 1864.

Before PECKHAM, MILLER and INGALLS, Justices.

APPEAL from order of special term, denying motion to set aside an execution against the property of the plaintiffs.

The plaintiffs, in the complaint in this action, allege that they were appointed trustees to receive subscriptions and donations for the Troy University, which was thereafter to be legally organized and incorporated; and that a subscription agreement was prepared and signed by the defendant and others, a copy of which was annexed. The plaintiffs claimed to recover the amount subscribed by the defendant. The complaint was dismissed, and judgment entered against the plaintiffs for costs.

The plaintiffs moved at special term to set aside the execution, as improperly issued against the plaintiffs as such trustees, claiming that they were not liable for costs in their private or individual capacity.

The motion was denied with ten dollars costs, and the plaintiffs appealed to the general term.

W. A. BEACH, for plaintiffs and appellants.

J. ROMEYN, for defendant and respondent.

By the court, MILLER, J. By section 317 of the Code it is provided, that in an action prosecuted or defended by an

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executor, administrator or trustee of an express trust, costs may be recovered, "but such costs shall be chargeable only upon or collected of the estate, fund or party represented, unless the court shall direct the same to be paid by the plaintiff or defendant personally, for mismanagement or bad faith in such action or defense."

In the case at bar, no order was obtained from the court that the costs should be paid by the plaintiffs; and the question arises whether the execution departs from the judgment, and was improperly issued against the plaintiffs personally.

I think the plaintiffs were trustees of an express trust, and, as such, the execution was improperly issued against them. They brought the suit as trustees, and so described themselves in the complaint. The instrument by virtue of which the plaintiffs acted, and the defendant was liable, shows that they were trustees. The powers conferred upon them were trust powers. They acted merely for the interest of those who had subscribed to the fund. They had no individual interest and derived no personal advantage from their position. Their names were merely used by the University, for the purpose of enforcing the subscription.

The Code (§ 113) provides that the trustee of an express trust shall be construed to include a person with whom or in whose name a contract is made for the benefit of another. The plaintiffs are clearly within this provision.* The contract of the defendant was made with them for the benefit of the University. No formal or written agreement is necessary to create a trust in money or personal estate; any declaration, however informal, which evinces the intention of the party with sufficient clearness, will have that effect. (*Day agt. Roth*, 18 N. Y. 448, 453.) Here there is a written instrument describing the parties as trustees, and evincing upon its face that it was designed to place them in that position.

* In Howard's *Unabridged Code*, vol. 1, under section 113, will be found collected all the reported cases bearing on the various positions in which the question of trustee of an express trust may arise.—REP.

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It is said that the plaintiffs are not trustees of an express trust, within the provisions of 2 Revised Statutes, 228 and 229, sections 55 and 56. The title which embraces these provisions relates to real property (*Id. p. 71*), and I think in no way conflicts with the provisions of the Code before referred to.

The authorities referred to by the defendant's counsel, to sustain the doctrine that the plaintiffs have brought the action as individuals, and that the description in the title of the summons and complaint, and the allegations in the complaint, are but a designation of their persons and not an averment of their office, are not applicable to the present case. In those cases it appeared quite distinctly that the debt accrued to the parties themselves, after the decease of the person they represented; and there was nothing to show any obligation to them in a representative capacity.

Here the defendant promised to pay the plaintiffs, as trustees; they acted as such, and the complaint shows that they seek to recover in that capacity.

In no point of view do I understand that this contract was made with the plaintiffs as individuals, and I think an action brought by them in their individual capacity could not be sustained; nor do I think the formal judgment of dismissal, entered in favor of the defendant, is conclusive as to the character and liability of the plaintiffs personally for the costs. The judgment entered must be taken in connection with the pleadings; and, as there appears to have been no direction of the court that the plaintiffs pay costs personally, under section 317 of the Code, it is not to be assumed that such an order was intended. This is not like a case where the court have formally decided, on a trial, that a party is not a trustee of an express trust. (*Sibell agt. Remsen*, 30 *Barb.* 441.) The question, whether the action was improperly brought or conducted in bad faith, was never presented to the consideration of the court by a motion for costs for that reason, and has not been passed upon.

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I think an appeal lies from the order. It was not an application for favor, nor a matter which rested in the discretion of the court. It affects a substantial right which had never been determined.

Order reversed, with \$10 costs of appeal.

SUPREME COURT.

In the matter of the petition of ANDREW BOYD, Assessor of the town of Groveland agt. MARY GRAY.

The residence of an inhabitant of a town during the months of June, July and August, therein, gives to the assessors of the town jurisdiction over his person and property, for the purposes of completing an assessment of his property.

If there is any change of residence or ownership of property after the 1st day of July, it does not affect the assessment roll. Any changes which the assessors are authorized to make after that time are simply such as may be required to correct mistakes.

If assessors err in their decision, upon the application of a person to correct his assessment made after the 1st of July, it is not such an error as invalidates the assessment or the tax afterwards based upon it.

The omission to copy upon the tax roll the affidavit made by the assessors, and annexed to the original roll, before its delivery to the supervisors, is not a jurisdictional error, and cannot be set up to prevent the collection of the tax.

Where, on the 1st day of August, an assessment has been properly made of the property of an inhabitant of the town, he cannot after that time shift his property and convert it into other property not liable to assessment, and, on the day fixed for reviewing the assessments by the assessors, apply and have his name and the amount assessed against him stricken from the assessment roll.

Monroe General Term, December, 1867.

*Present, J. C. SMITH, WELLES and E. DARWIN SMITH,
Justices.*

THIS is a proceeding commenced under chapter 318 laws of 1842, by Andrew Boyd, one of the assessors of the town of Groveland, Livingston county, New York, against Mary and Margaret Gray, to enforce the payment of a tax levied against them in said town. The defendants are residents of said town, and were each assessed for \$1,400, personal property, on the roll of 1865. Up to about the first of August,

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1865, they severally had this amount of personal property liable to taxation, but it was then converted into non-taxable government securities. On the 15th day of August, 1865 (the day appointed by the assessors for the revision of their roll), these defendants appeared before the assessors and applied to them to reduce the value of the personal estate severally set down to them in said roll, and in all respects complied with the statute in such case made and provided. The fact of such conversion into non-taxable bonds before such review day was not disputed by said assessors, but they refused to reduce said assessment of \$1,400, and failed to give to defendants any notice of their disagreement to the sworn valuation, as required by statute, and a tax was thereafter levied upon the same. It appears from a stipulation annexed to the return herein that there was no affidavit nor certificate of said assessors written upon, annexed to or in any way forming a part of the tax roll delivered to the collector of said town, and on which the tax was alleged to have been demanded of these defendants, to recover which this proceeding was commenced; but in all other respects it was a fair copy of the original assessment roll.

A fine was imposed upon each defendant at the Livingston special term, in August, 1866, sufficient to pay the tax and costs.

This is an appeal from that order.

The following opinion was given at special term:

JOHNSON, Justice. There is no question made but that the persons proceeded against (whom for convenience I shall denominate defendants) were regularly and properly assessed in the first instance. They had severally the property for which they were assessed, up to and including the first day of August, which was then liable to be assessed and taxed in their hands. Their names were properly placed upon the assessment roll by the assessors, whose right and duty it was to place it there as they did, together with the just and true amount of the personal property each then had liable to tax-

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ation. The statute requires the assessors to ascertain the names of all the taxable inhabitants of their respective towns, and also all the taxable property, real and personal, therein, between the first day of May and July in each year. (*1 R. S. 390, § 8.*) They are then required to prepare an assessment roll, on which they are to enter the names of the taxable inhabitants thus ascertained, and the property and the value thereof. (*Id. § 9.*) This roll is to be completed on or before the first day of August, and a fair copy thereof made and left with one of the assessors. No question can be made, therefore, that on the first day of August these persons had been and were duly and legally assessed for their taxable property. After this time the defendants shifted their property and converted it into other property not liable to be assessed; and on the day for reviewing the assessments made their affidavits of these facts, and claimed that their names and the amount assessed against them should be stricken from the assessment roll. This the assessors declined doing, on the ground, amongst others, that they doubted their right to strike off as requested, under the facts presented.

It is claimed on the behalf of the defendants that by this application, and upon the facts thus verified, the defendants had the legal right to have their names stricken from the roll with the assessments; that the assessors were thus ousted of their jurisdiction to retain such names and amounts upon such roll, and that the entry before made became and was wholly void as an assessment.

This position, I think, cannot be maintained with any show of reason. The assessment was then made and was complete. The assessors had undoubted jurisdiction to make it as it then was. The question before them was whether they should vacate it altogether, by reason of a new fact not affecting the validity of the original assessment. This question they were required to pass upon, and, if they decided erroneously, it did not affect the validity of the assessment. If they had jurisdiction, though they erred in the exercise of

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it, their proceedings were not thereby rendered void and of no effect. A tax cannot be attacked and defeated collaterally, except for want of jurisdiction in the officers by whom it is imposed. Errors not going to the jurisdiction to act in the premises, cannot be reviewed or corrected in a proceeding like this.

But I am clearly of the opinion that the assessors decided correctly in refusing to strike out the assessment, not because they had not the power to do so, but because the property had been regularly and lawfully subjected to assessment and taxation in the defendants' hands, and against them. It does not follow, by any means, that because they had seen fit to shift it and exchange it for other property after the first of August, they were to escape taxation. They had had the benefit of it until it was assessed to them regularly, and I do not think they can exempt themselves from all liability by shifting it into other hands, after the roll is completed and the proper time for entering new names has elapsed. If such were to be the rule, great frauds might be practiced, and large amounts of taxable property be withdrawn from taxation altogether.

The opinion of DENIO, Ch. J., in *Mygatt agt. Washburn* (15 N. Y. R. 316) illustrates the principle. I entertain no doubt whatever that the assessors not only possess the power, but that it is their plain duty, to strike any assessment from the roll which has been erroneously or improperly placed there, at any time before their affidavit is attached and it is ready for delivery to the supervisor of the town. (*The People agt. The Supervisors of Westchester*, 15 Barb. 607.) While it remains in their possession and under their control, they have jurisdiction to correct any and all errors which are brought to their notice in a legal and proper manner. But this was no error. It was a legal and just assessment when it was made and entered, and never became otherwise. The assessment and tax were therefore both valid, and the defend-

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ants were bound to pay the same when duly called upon for payment by the collector of the town.

The counsel for the defendants also object that the tax has never been duly demanded, for the reason that the affidavit, which the statute requires the assessors to make and attach to their corrected roll, before delivering it to the supervisor of the town, was not attached to the roll in the hands of the collector. It is argued that the roll and warrant furnish no evidence of authority to receive or collect the tax, unless the affidavit is also attached. But this clearly is not so. It is true that the proper affidavit must be attached to the completed assessment roll when it is delivered to the supervisor, or the board of supervisors will have no jurisdiction to impose the tax and issue their warrant for its collection, as was held in *Van Rensselaer agt. Witbeck* (3 Seld. 517). But this corrected roll does not necessarily, nor indeed usually, I think, go into the hands of the collector. The statute requires the board of supervisors to cause the corrected assessment roll, "or a fair copy thereof," to be delivered to the collector, with a warrant under their hands and seals annexed. (1 R. S. 396, §§ 36, 37.) There is nothing to show that the corrected roll delivered by the assessors to the supervisor had not the proper affidavit attached; nor is it shown that the roll delivered to the collector with the warrant was not a fair copy of such corrected roll. In the absence of proof to the contrary, the presumption is that it was all regular. This presumption always obtains in favor of the due performance of official duty in such a case. The 35th section of the statute last referred to requires the board of supervisors to deliver to each supervisor the corrected roll of his town, or a fair copy thereof, to be filed in the town clerk's office of their respective towns. The original corrected roll was in fact delivered to the supervisor of the town, and filed in the town clerk's office, and has annexed to it the proper affidavit.

My conclusion, therefore, is that the tax was duly levied,

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and payment thereof regularly demanded of each defendant, and that they were guilty of misconduct in refusing to pay the same.

A fine must therefore be imposed on each defendant, sufficient to pay the amount of the tax and the costs of this proceeding.

The defendant Mary Gray appealed from this order to the general term.

ADAMS & STRANG, for petitioner, appellant.

I. This proceeding was unauthorized, for the reason that the moving papers show the defendant to have had in her possession, at the time such alleged demand was made, United States bonds sufficient in amount to pay the tax imposed upon her, and which bonds were subject to levy and sale by the collector of the town of Groveland. (*See. Laws 1842, ch. 318, § 1.*)

The statement in the affidavit of the collector, that levy could not be made upon them, is not the statement of a fact, but of his conclusion of law.

II. No valid assessment existed until the affidavit required by 1 Revised Statutes (5th ed. p. 913, § 25) to be made by the assessors was made and attached to the assessment roll, at which time it is admitted and was proved before said assessors that these defendants had no taxable property. (*Van Rensselaer agt. Witbeck, 3 Seld. 521; Mygatt agt. Washburn, 1 Smith, 318.*)

1st. The statute expressly provides that "When the assessors, or a majority of them, shall have completed their roll, they shall severally appear before one of the justices," &c., and make the affidavit in the form prescribed. By the language of this affidavit, the assessors are required to swear that the assessment roll contains (i. e., as it exists when the oath is made) "a true statement of the aggregate amount of the taxable personal estate of each and every person named in such roll," excluding such "property as is exempt by law from taxation." (1st Rev. Stat. 5th ed. p. 913, § 25.)

2d. Until the revision and correction is completed, and this affidavit is attached to such roll, the action of the assessors is merely preliminary, and in the nature of a notice or order to the parties severally named therein to show cause why they should not be assessed for the amounts specified in such list. (*Wheeler agt. Mills, 40 Barb. 644.*)

The assessment certainly cannot be said to be completed so long as the assessors have not passed upon the same judicially, and have at their meeting for revision and correction a right to change, alter or modify any one or all of the names or sums on the same. The assessment roll, which the statute requires to be completed on or before the first day of August in each year (1 R. S. 611, § 17), is plainly only a consolidation of the minutes of the several assessors for the districts allotted to them, and may be, in fact often is, never seen after such consolidation by more than one of the assessors, until the day for revision and correction.

The petition in this case states, that after such review day "the assessment roll was duly completed by the said assessors," and the necessary affidavit written thereupon and certified by one of the justices of the said town of Groveland.

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One assessor cannot make an assessment; it is the joint act of all, or a majority. (*People agt. Supervisors of Chenango County*, 1 Kern. 571.)

There can be no clearer statement of the law upon the question when is the assessment completed, than that given by BROWN, J., for the court, in *Mygatt agt. Washburn* (p. 318). He says: "I entertain no doubt but that the day on which the "assessment roll was signed, certified and delivered to the supervisor, was the completion of the assessment which forms the ground of the action."

3d. In the absence of any statutory provision as to the time when the assessment shall take effect, it is submitted that the rule of interpreting pleadings is applicable, and should control; which is, that they shall be construed as referring to the time when the pleading was verified. (*Voorhies' Code*, 8th ed. p. 320, note a; *Prindle agt. Caruthers*, 15 N. Y. 426.)

4th. But it is claimed that the statute by express provision (1 R. S. p. 912, § 21) fixes the time when the assessment shall be operative as to parties who apply for a reduction: "It shall also be the duty of the assessors, whenever the valuation fixed by them, after such examination, shall exceed that sworn to by the aggrieved party or person, to indorse on the written examination the words 'Disagreed to by the undersigned assessors, under the rule prescribed for making assessments, by section 15, article 2, title 2, chapter 13, part 1 of the Revised Statutes, and in view of the obligations imposed by the deposition and oath subscribed and made on the completion of the assessment roll, to which this disagreement refers.' It shall be the duty of the assessors on the same occasion to furnish the aggrieved party or person a duplicate copy of the before mentioned written examination, together with the indorsement of disagreement aforesaid, duly signed."

It is evidently the intention of the statute that such indorsement shall stand as the judgment of the assessors upon the appeal, and that until such indorsement is made there is no judgment or entry of judgment. There is no evidence in this case of any judgment upon the appeal, and it appears affirmatively that no evidence of such judgment, which is the basis of this proceeding, was ever brought to the notice of the defendants. The court will not presume that such judgment was rendered. (*Sheldon agt. Wright*, 7 Barb. 39; *People agt. City of Brooklyn*, 21 Barb. 484.)

The assessors having failed to pursue the directions of the statute in making the indorsement and giving the defendants notice thereof, the assessment is unauthorized and void, as those provisions must be strictly complied with, and such compliance must appear affirmatively. (*Whitney agt. Thomas*, 23 N. Y. 281; *Sharp agt. Spier*, 4 Hill, 76, 92.)

5th. The objection raised by the opinion of the special term in this case, that the rule as claimed to exist in the preceding subdivision, if admitted, would open the door to great fraud, is a consequence of the defectiveness of the statute upon such point, and should be remedied by the legislature, not by judicial legislation.

III. Where application is made by any person to the assessors to reduce the value of real or personal property as set down in the assessment roll, the assessors act judicially in fixing such value, and are called upon to pass upon the evidence adduced before them; and when they have no ground in such evidence to fix a valuation different from that sworn to by the applicant for such reduction, they are bound to take and follow such statement under oath. (*Weaver agt. Dendorf*, 3 Denio, 117; *The People ex rel. Raplee agt. Reddy et al.* 43 Barb. 599.)

1st. As matter of fact, there is no dispute but that these defendants complied literally and exactly with the provisions of the statute. (1 R. S. 5th ed. 912, § 21.) They appeared before such assessors on the proper day, made application to have the value of their personal estate reduced, were examined under oath touching such value, and did not refuse to answer any question put to them touching the value or amount of

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their personal property. It does not appear that any other evidence upon this point was called for, and that given states precisely that on or about the first day of August, 1865, and before such review day, these defendants converted all their taxable personal property into United States non-taxable bonds.

2d. Previous to the passage of chapter 176 laws of 1851, the assessors were bound to correct their assessment roll in accordance with the affidavit made and produced to them, in conformity with the statute. (*See cases above cited, and other authorities referred to in them.*)

3d. While such act of 1851 takes away the conclusiveness of an affidavit so made, it does not give, and was not intended to give, the assessors any right to fix such value arbitrarily, or any additional power further than the right of cross-examination and power to call for evidence supplementary to the affidavit. The statute, it is true, gives them the right "to fix the value thereof at such sum as they may deem just," but they are still bound by the usual rules of evidence applicable to judicial proceedings, and must decide upon the evidence adduced before them, unless such evidence is intrinsically defective or unreliable in its nature.

The opinion of this court in *People agt. Reddy* (43 Barb. *above cited*), decides this point fully and fairly. The court, E. D. SMITH, J., says: "He (the relator) testified "that he had no personal property liable to taxation except the capital stock of his "bank; and the board of assessors, I think, were bound to take his statement under "oath on that point. * * * They act judicially in fixing such value, "and are called upon to pass upon the evidence produced before them; and when "they have no ground in such evidence to fix a valuation different from that sworn "to by the person applying for such reduction, they are bound, I think, to take and "follow his statement under oath; as much so as the assessors were formerly required "to fix such value at the sum specified in the affidavit required in such cases by the "15th section of article 2, chapter 13 of part 1st of the Revised Statutes."

The court thus holds that the rule is now substantially the same as prior to the passage of such act of 1851, except that the board of assessors, as a court, have the right to decide upon the weight of evidence adduced before them. Under the former statute, the court say, in *Weaver agt. Devendorf* (3 Denio, *above cited*), per BEAEDSLEY, J.: "In some particulars the duty of assessors is undoubtedly ministerial, but in fixing the value of taxable property, the power exercised is in its nature purely "judicial. With the exception of real and personal estate, the value of which is sworn "to as authorized by law, the residue is to be valued, estimated and determined by "the assessors."

IV. The opinion of the special term shows a misapprehension on the part of Justice JOHNSON as to one of the main points in issue. *It assumes* that on the 1st day of August, 1866, "the assessment was then made and was complete," and that "the assessors had undoubted right to make it as it then was," and then proceeds to discuss the question whether the assessors were bound to vacate it, in consequence of the occurrence of new facts. Instead of this, the defendants claim expressly that, there being no assessment, the question was whether they should then be assessed for property previously disposed of.

V. No legal demand of the payment of the tax in question has ever been made upon the defendants Mary and Margaret Gray, and they cannot therefore be charged in this proceeding as with a contempt.

1st. The authority of the collector to demand taxes is based upon the assessment roll as corrected by the board of supervisors, or a fair copy thereof, with a warrant thereto attached under the hands and seals of the board of supervisors, or a majority of them. (1 R. S. 914, §§ 35, 36.)

No proceeding as for a contempt, penal in its nature, can be sustained, unless the

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moving party shows that the provisions of the statute have been strictly and literally complied with; and in such proceedings no presumption obtains in favor of the performance of official duty. In *Metcalf agt. Messenger* (46 Barb. 325, which was an appeal from an order made at special term, imposing a fine in a proceeding precisely similar to this), the general term, per WELLES, J., say that, "In a proceeding to charge a party as for a contempt, 'no intenders of material facts should be indulged in';" and the order appealed from was reversed because it did not affirmatively appear that the assessment was made by all or a majority of the assessors.

2d. The affidavit or certificate of the assessors being a necessary part of the assessment roll, the absence thereof is a defect apparent on the face of the process, and such a departure from that authorized by statute that no legal demand could be based upon it.

In *Van Rensselaer agt. Wilbeck* (3 Seld. 517), the court held that the certificate is indispensable," and that "the proceedings would have been fatally defective if no "certificate had been attached."

If this be the law, and language is to be given the ordinary meaning, the "fair copy" which the statute provides may be given to the collector in lieu of the corrected assessment roll, must contain a copy of the affidavit or certificate, in order to be a "fair copy," and to authorize the collector to demand the several items of taxes.

3d. The stipulation in this case recites expressly that the tax roll delivered to the collector of Groveland, and by virtue of which these taxes were demanded, had "no "affidavit, nor copy affidavit, nor certificate of said assessors, written upon, annexed "to, or in any way forming a part" thereof. It was therefore incomplete, was neither the corrected assessment roll nor a fair copy thereof, and, so far from authorizing proceedings of a penal nature to be founded upon it, was no protection to the collector, because defective upon its face.

A. J. ABBOTT, for petitioner, respondent.

This is an appeal from the judgment of this court at special term, made in a special proceeding, under laws of 1842, chapter 318, 1 Revised Statutes, 5th edition, page 919.

There is no dispute about the facts. The assessors were duly elected, &c.

The appellant was a resident of the town of Groveland, and taxable therein. (1 R. S. 5th ed. 909.)

The assessment was duly made between the first days of May and July, &c. (1 R. S. 5th ed. 909.)

The roll was duly completed before the first day of August; fair copy made, &c., and notices thereof duly made, &c. (1 R. S. 5th ed. 911, § 17.)

The assessors duly met on "appeal" day, and heard complaints, &c., including the complaint of the appellant here. (1 R. S. 5th ed. 911, § 18.)

Assessed appellant \$1,400 personal property; completed roll, verified in due form, and delivered it to supervisor before first day of September, and he delivered same to the board of supervisors at their next meeting. (1 R. S. 5th ed. 913, §§ 25, 26.)

The board of supervisors duly levied the tax of \$65.71 against appellant, and the roll, with warrant, &c., was duly delivered to the collector, &c. (1 R. S. 5th ed. §§ 35, 36.)

The collector thereupon caused notices of the reception of the tax roll to be posted, &c., according to law. (1 R. S. 5th ed. 917.)

The collector, after the thirty days had expired, appellant having neglected to pay the tax, called on her, demanded payment, and she refused to pay, &c. (1 R. S. 5th ed. 918, §§ 3, 6.)

Boyd agt. Gray.

The appellant having no property liable to levy, but having property liable to pay taxes, the collector duly made his report to the assessors. (1 R. S. 5th cd. 919.)

The assessor, Boyd, thereupon instituted this proceeding. The court will see, by comparing the facts in the case with the several sections of the statute referred to, that everything necessary to be done to make the levy or tax valid, was regularly and strictly done.

But the appellant sold the bond and mortgage assessed after the assessment roll was completed, to wit, after the *first of July*, beyond which time the assessors could make no further assessment, and at which time the tax payer's liability to be assessed for a tax to be thereafter levied becomes fixed, such sale also being after the *first day of August*, when the roll was completed; and she claims exemption from the tax on account of such sale.

Thus we are brought to the only question in this case, viz.: *At what time does an assessment or valuation of property by assessors, as a basis for taxation thereon, become complete, or so far complete as to preclude the tax payer from changing her residence, or one kind of property to another kind, for the purpose of evading the tax?*

We are content to rest this question upon the clear and sound opinion of his honor Mr. Justice JOHNSON, who decided this case at special term, and the opinion of the court of appeals in *Mygatt agt. Washburn* (15 N. Y. R. 316, 35 N. Y. R. 462)

By the court, E. DARWIN SMITH, J. In the case of *Mygatt agt. Washburn* (15 N. Y. 320), it was held, that the assessment should be considered as made at the expiration of the time limited for making the inquiry, viz., on the first of July, and that if there is any change of residence or in the ownership of the property after that day, it does not affect the assessment roll. The inquiry is then completed. Any changes which the assessors are authorized to make after that time are simply such as may be required to correct mistakes. The appellant in this proceeding was a resident of the town of Groveland, in June, July and August, 1865. The assessors, therefore, clearly had jurisdiction of her person and property, when they made and completed their assessment roll. If they erred in their decision, upon the application of the appellant to correct their assessment or reduce the amount or value of her personal property, it was not such an error as invalidated their assessment. It was not a jurisdictional question; the error might have been reviewed upon *certiorari* at any time before they had delivered the roll to the supervisors. (*People agt. Reddy*, 43 Barb. 539.) But the error could not affect the validity of the tax afterwards imposed, based upon such assessment. I do not see, therefore, why the tax levied upon

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the property of the appellant is not legal, and why the proceeding to enforce the same is not entirely regular and duly warranted by the statute under which it was instituted. The omission to copy upon the tax roll the affidavit made by the assessors, and annexed to the original roll, before its delivery to the supervisors, is not a jurisdictional error, and cannot be set up to prevent the collection of the tax. (*Parish agt. Golden*, 35 N. Y. 462.)

I think the question presented was rightly decided at special term, and for the reasons there given, and that the order appealed from should be affirmed, with costs.

SUPREME COURT

CONRAD C. CROUNSE agt. JOHN WHIPPLE.

JOHN KEENHOLTS agt. THE SAME.

Prior to the amendment of section 344 of the Code in 1860, an appeal from an order of the county judge in *supplementary proceedings*, would not lie in any cause originating in a justice's or county court. But under said amendment of that section, appeals now lie in such cases.

Supplementary proceedings are limited to reaching the property of the judgment debtor in his possession, or in the possession of another party, which are conceded to belong to the defendant.

Where property is in the hands of others who make claim to it, the judge has no power to proceed and try the question of title. The proper course is for the judge to appoint a receiver, who may bring an action to try the claim of title.

Albany General Term, March, 1865.

Before PECKHAM, MILLER and INGALLS, Justices.

APPEALS from orders made by the county judge of Albany county in the above actions, in proceedings supplementary to execution, requiring Elizabeth Whipple, the wife of John Whipple, to pay the amount of a judgment in each of said actions against her husband, the defendant therein, and the costs of the proceeding. The evidence shows that Elizabeth had advanced money to her husband, which, it is claimed,

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belonged to him; and that a mortgage was executed to her by one Alonzo Whipple upon a farm sold to him by John Whipple, to secure her \$1,000 for the money alleged to have been paid, as well as for her contingent right of dower in the farm, and to procure her release of the same. The amount of the mortgage had been paid to her. Elizabeth was made a party to the proceedings, and she and her husband both appealed from the orders made by the county judge.

The judgments were originally obtained before justices of the peace, a transcript filed and executions issued by the county clerk.

A. B. VOORHIES, *for appellants,*
C. M. HUNGERFORD, *for respondents.*

By the court, MILLER, J. A preliminary objection is taken to the appeals made in these causes, from the orders of the county judge, upon the ground that no appeal lies from an order of a county judge, in proceedings supplementary to execution, in a cause originating in a justice's or in a county court.

In *Smith agt. Hart* (11 How. 203), it was held, that such an appeal did not lie. This decision was made in 1855, and since that time section 344 of the Code has been amended, and by the amendment an appeal is authorized to the supreme court "from any order affecting a substantial right made by a county court or a county judge, in any action or proceeding." Under this provision, I think an appeal can be had and the objection therefore, is not well taken.

The remaining question presented relates to the power of the county judge to make an order, to compel the wife of the defendant to pay over the amount of the several judgments to the plaintiff. The proof shows that the alleged consideration of the mortgage, which Elizabeth Whipple held, was for money loaned to her husband, as well as for her joining with her husband, in a conveyance of his real estate. This claim was disputed upon two grounds: *First*, that the

Cromise agt. Whipple.

moneys alleged were not advanced by the wife to her husband; and *secondly*, because the defendant had no right to secure his wife's contingent right of dower in his real estate. The question whether the moneys were actually advanced, and whether there was a sufficient equitable consideration, to uphold the security given, were matters of grave dispute. So also, the question as to the right to secure the contingent dower of the wife in such a manner, and its value if such a right existed, was a matter which would only be satisfactorily determined after full proof and due deliberation, in a suit instituted for that purpose. Under such a state of things, as I understand the rule, the judge had no power to make an order to pay over the money. Supplementary proceedings are limited to reaching the property of the debtor in his possession, or in the possession of another party, which are conceded to belong to the defendant, when it is in the hands of others, who make claim to it, the judge has no power to proceed and try the question of title; but the proper course is, to appoint a receiver by whom an action may be brought against the party claiming the property, to test the validity of the claim. (*Stewart agt. Foster*, 1 *Hilt.* 505; *Hall agt. McMahon*, 10 *Abb.* 103; *Teller agt. Randall, &c.*, 40 *Barb.* 242; *Code*, §§ 297, 298 and 299.)

I am inclined to think therefore, that the county judge erred in making an order to pay over the moneys. The orders should have been for the appointment of a receiver to test the question, as to the claim of the defendant's wife to the moneys, and the orders should be modified accordingly. The costs of the proceedings and appellant's costs of this appeal, must abide the result of the litigation.

Hill agt. Collins.

SUPREME COURT.

THE PEOPLE *ex rel.* JEROME HILL agt. GEORGE S. COLLINS
and MILTON VAN VOORHES.

An action under section 432 of the Code, in the nature of a *quo warranto*, by the people on the relation of a person claiming title to the office of trustee of a school district, will not lie, where that question has been presented to the superintendent of public instruction and decided by him adverse to the relator. The act of 1864, relating to public instruction, makes the decision of the superintendent on that question final.

Monroe Special Term, June, 1867.

Present, E. DARWIN SMITH, Justice.

MOTION to dissolve injunction.

In this case, an injunction had been granted by a county judge, restraining the collection of a tax for school purposes, levied and imposed by Collins, as trustee of the school district. Defendant Van Voorhes was the collector of the district, and was proceeding to enforce such tax.

The motion was to dissolve the injunction.

W. H. ADAMS, for defendant.

H. H. WOODWARD, for plaintiff.

E. DARWIN SMITH, Justice. This is an action under the Code (§ 432), brought by the attorney general in the name of the people upon the relation of Jerome Hill, to try the title of the defendant Collins to the office of trustee, and of the defendant Van Voorhes to the office of collector of school district No. 9, in the town of Victor, county of Ontario. Such action is a substitute for the writ of *quo warranto*, and may be brought when any person shall usurp, intrude into or unlawfully hold or exercise any public office, civil or military, or any franchise, within this state. The only issue which can be raised or tried in the action is the title to the office, and the only judgment which can be rendered will be

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one affirming the relator's title to the office, and of ouster as against the defendant; or of dismissal of the complaint, if the people fail in the action. The question, whether the relator or the defendant Collins is the legal trustee of said school district, has been presented to the superintendent of public instruction, been passed upon by him, and expressly adjudicated in favor of the defendant, in a decision made by him on the 18th day of February last. This decision covers the whole question which can be tried and decided in this action; and the question presented to this court is, whether this action will lie to review such decision of the superintendent, or notwithstanding such decision.

I have no doubt this decision is binding and conclusive upon these parties, and that this action cannot be maintained. The legislature clearly intended that all questions relating to the holding of school district meetings, and any and all official acts of school officers, trustees, commissioners, supervisors or others, relating to the conduct of common schools, or concerning any matter, act or duty required or performed under the law providing for the organization and maintenance of common schools, or any law relating or pertaining thereto, should or might be presented on appeal to the superintendent of public instruction, and should be decided by him, and, when so decided, the act, section 1, title 12, of the act of 1864, relating to public instruction (*Sess Laws p. 1244*), expressly declares that the "decision of such superintendent shall be final and conclusive, and not subject to question or review in any place or court whatever." I have no doubt this is a valid act, and that the legislature had ample power to pass it. It was designed to save and prevent litigation in the courts in respect to the many questions of dispute constantly arising in the school districts of the state, in respect to school officers, and the conduct of such officers in the management and control of the affairs of the common schools. It seems to me that it was a wise and judicious provision to settle school controversies promptly and summarily, and save districts and district officers the

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trouble, vexation, strife and expense of litigation in the courts. But if it were otherwise, the courts are bound to obey the law, and refrain from any review of the proceedings or decisions of the superintendent. The superintendent has decided that the defendant is the lawful trustee of this school district, and that decision must end this controversy. His decision is final, and the parties must submit to it. Such decision disposes of all the questions which can be litigated in this action, and leads to the conclusion that the injunction must be dissolved, and it is dissolved, with costs to abide the event.

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COURT OF APPEALS.

RICHARD P. BRUFF, executor agt. HIPPOLITE MALI and OTIS P. JEWETT.

Where the plaintiff, as stockholder of an incorporated company, brings an action against a portion of the directors of the company, including the president and vice-president, for damages sustained by reason of the fraudulent over-issues of the stock of the company by the defendants; to be entitled to recover, he must prove satisfactorily to the jury that the certificates of stock bought by him did not represent genuine stock, or any part of the stock of the company, but constituted part of the over-issue not authorized by its charter.

Then the burden is on the defendants to remove the inference deducible from these facts, by showing that the plaintiff's certificates were issued on the surrender, or on the transfer of genuine stock. This might be difficult, but, if so, or even actually impossible, the defendants should not be heard to complain, when their own admitted culpability creates the dilemma.

Where it is established by competent evidence that the defendants have issued false certificates of stock of the company, authenticated by them as genuine, and thrown them upon the market with fraudulent intent, *they are liable to every holder* to whose hands they may come by fair purchase. In such case, the doctrine, which is undoubtedly true, that a vendor of property guilty of fraud on its sale, or who sells with a warranty, is liable only to his vendee, and a subsequent purchaser acquires no right of action therefor, does not apply.

January Term, 1867.

BOCKES, J. This action was brought by Shotwell, since deceased, and is now prosecuted by his executor, who has been substituted as plaintiff in the case.

Bruff agt. Mali.

A recovery was had against Mali and Jewett, former president and vice-president of the Parker Vein Coal Company, a corporation created by the laws of Maryland, having its principal place of business in New York.

The complaint contained three separate counts or causes of action. In the first, after an averment that the plaintiff was a stockholder, it was charged that the defendants misconducted in their office of president and vice-president, and wrongfully and fraudulently over-issued the stock of the company, by reason of which the plaintiff's stock was rendered unsaleable and valueless. In the second, it was charged that the defendants made false and fraudulent representations in regard to the financial affairs of the company, whereby the plaintiff was induced to purchase stock of the company, which in fact was valueless. In the third, it was averred that the defendants, as officers of the company, and after the whole amount of the capital stock had been issued, made and issued other certificates purporting to be genuine certificates of shares of the capital stock of the company, which were false and fraudulent, and sold and disposed of the same as true and genuine stock, four hundred and eighty shares of which the plaintiff purchased and received as genuine, to his great damage.

On the trial, the judge held and decided that the plaintiff was not entitled to recover on either the first or second counts of the complaint. Whether he was right or wrong in this ruling is not before us for decision, inasmuch as the plaintiff did not appeal. The recovery was under the third count, and the questions presented to this court for examination arise under the appeal by the defendants from the judgment having its basis on that count.

It may be well to examine the case in the order in which the questions arose on the trial. It was not disputed that the defendants Mali and Jewett were officers of the company. Both were directors, the former its president and the latter its vice-president. Nor was it controverted before

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the court on the trial, that after the whole capital stock was filled and certificates for the entire amount issued, the defendants without authority continued to make further and over-issues to an erroneous and ruinous amount. It was proved, or there was evidence tending to prove, that the fraudulent or over-issues were made prior to the time when the plaintiff made his purchases, and prior to the dates of the certificates of stock issued to them, in small numbers at first and afterwards freely, and that the over-issues were made by the defendants deliberately, from time to time, as inducements were suggested. The authorized capital stock was \$3,000,000. The spurious stock, from over-issues, exceeded \$12,000,000.

Under this state of facts the plaintiff rested the case, and the defendants moved for a dismissal of the complaint. The judge remarked, in substance, that it appeared from the evidence that the plaintiff's certificates of stock were issued after the stock was full and over-issues had commenced, and that, in the absence of evidence that the certificates were given on the surrender of stock, it was for the jury to say whether they were genuine; and he denied the motion. This ruling was manifestly correct. The genuine certificates were all out before those obtained by the plaintiff were issued. There was no proof, then, that any of the genuine certificates had been surrendered and new ones issued in their place. It might well be that there had been, but there was no proof of it in the case. There was only a suspicion growing out of a probability, because the stock, or what purported to be the stock, of the company, had been in the market.

Thereupon evidence was given by the defendants to the effect that, from a time prior to the purchase by the plaintiff of his stock, there were surrenders and transfers of certificates to a very great extent daily at the office of the company. But the witness was unable to say whether such surrenders and transfers were of the genuine or spurious stocks, at least he did not identify a single transaction of the kind where the stock was issued prior to the issuing of the spurious certifi-

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cates; and in regard to the certificates held by the plaintiff, he said it was impossible for him to say whether they were issued on the sale of stock for cash, or whether they were issued on the surrender of other certificates; that it would be a mere presumption for him to state.

The judge was then requested to hold and to instruct the jury that there was not sufficient evidence to warrant a finding that the stock in question was not genuine, which he declined to do. This decision was also correct. It was very doubtful whether the case was materially changed from what it was when the plaintiff rested.

Did the evidence given by the defendants clearly and indisputably establish the fact that the plaintiff's certificates were genuine, or were issued on a surrender or transfer of genuine stock? Certainly not, and, if not, then the question still remained for the jury, and it would have been error to have instructed them as requested.

Even if the case had been changed by the defendants' evidence, unless made entirely certain in their favor, it would still remain for the jury to say what effect should be given to the evidence, especially if it was to a considerable degree a matter of opinion or reasoning, and also to what extent a change had been effected by the proof. All that the defendants could rightfully claim, as regards this point, was that the judge should charge, as he did do, that, to entitle the plaintiff to recover, he was bound to prove to the satisfaction of the jury that the certificates bought by him did not represent genuine stock, or any part of the stock of the company, but constituted part of the over-issue not authorized by its charter. There was evidence before the jury bearing strongly on this question. The entire stock of the company had been taken, and certificates therefor issued; after which, and prior to the purchase by the plaintiff, the defendants had commenced their system of false issues.

The plaintiff's certificates certainly belonged to the class

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of spurious issues, unless genuine ones had been surrendered and new ones sent out in their place.

The burden was on them to remove the inference deducible from these facts, and which they could have done by showing that the plaintiff's certificates were issued on the surrender, or on the transfer of genuine stock. This might be difficult, but, if so, or even if actually impossible, the defendants should not be heard to complain, when their own admitted culpability creates the dilemma.

No error occurred in the admission or rejection of evidence, nor was admitted against objection bearing on the question submitted to the jury, nor was any excluded to which the defendants were entitled. They were allowed to prove that the plaintiff voted, or authorized some one to vote, on his stock, as some evidence bearing on the question of its genuineness. But the offer to show that the directors of the Parker Vein Coal Company, with the consent of the plaintiff, transferred the property of the company to the American Coal Company, and accepted the stock of the latter in exchange for the stock of the former, and that the plaintiff took stock in the latter under this arrangement, was properly rejected. Those facts had no tendency to prove that the plaintiff's certificates represented the genuine stock of the original company. How he disposed of the stock did not prove it genuine or otherwise. This was a matter with which the defendants had no concern. Their liability was complete, if liable at all, at the time of the purchase by the plaintiff.

The case having been properly sent to the jury, and the jury having found in favor of the plaintiff, must now be further examined, on the hypothesis that the plaintiff's certificates did not represent the genuine stock of the company, but were spurious. In this view, the defendants asked the judge to charge the jury, as matter of law, that, even if spurious, there was no evidence that the certificates in question were purchased from the defendants or from the Parker Vein

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Coal Company, and that, if not purchased from either, then they were not liable in this action. These requests, and the refusal of the judge so to hold and charge, present the only remaining question of importance pressed on our consideration.

The learned judge instructed the jury on this point as follows: "That there was no evidence that the certificates were purchased from either the defendants or the company, but that it was unnecessary for the plaintiff to prove that he purchased from either; that, if the defendants issued the stock, and the plaintiff purchased it on the faith that it was genuine, authenticated as it was, the defendants were liable, although the actual purchase was made of others."

It is undoubtedly true that a vendor of property guilty of a fraud on its sale, or who sells with warranty, is liable only to his vendee. A subsequent purchaser acquires no right of action therefor. As was well stated by the court below, there is in such case no privity between the vendor and such subsequent purchaser. But is such this case? Let us see clearly what facts must be deemed established by the verdict of the jury.

The verdict is general for plaintiff, and every intendment is in favor both of its correctness and completeness, to sustain the recovery. The jury have found that the certificates of stock purchased by the plaintiff were spurious; that the defendants issued or caused them to be issued with a fraudulent purpose, and that the plaintiff purchased them in good faith, supposing them to be genuine; that is, supposing them truly to represent a part of the capital stock of the company. That they could not be enforced or employed as stock; in other words, that they gave the purchaser no rights as stockholders, is decided in *The New York and New Haven Railroad Company* agt. Schuyler (34 N. Y. 30). These false certificates were sent forth by the defendants, were thrown in the market by them, as was said in this case cited, "with

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a view to well known and commercial usages." They authenticated them, falsely and fraudulently attested them as genuine. They bore on their face such false attestation, which was equivalent to an assertion on their part to all persons who should purchase, or to whom they should be offered, that they were genuine. In this way they invited confidence and induced trade. These acts were done with the intent to defraud any and all purchasers, well knowing that every person to whose hands these false certificates should come by fair purchase might be injured. Wherefore, having authenticated and issued these certificates for the purpose of defrauding, the defendants should be held liable to any one sustaining damage by purchasing on the faith of their genuineness. In this view the defendants are to be considered as acting directly upon and influencing the purchaser, and of course liable, as every tortfeasor is, for the damages occasioned by their wrongful act.

It was held in the *New York and New Haven Railroad case*, above cited, that every *bona fide* holder of spurious certificates (issued as were those of the plaintiff here) had a right of action against the company for negligence, in permitting its officer and agent to perpetrate a systematic course of fraud, like that proved in this case. It mattered not how many transfers had been made. If the certificates had their origin in the fraudulent or over-issues, they were void, and the *bona fide* holder had his claim against the company for damages occasioned by the fraudulent act of its agent; and in such case a joint action will lie against principal and agent (*Phelps* agt. *Wait*, 30 N. Y. 18), or a separate action against either (*Suydam* agt. *Moore and Losee*, 8 Barb. 358). The wrongful act is the servant's in fact, and the principal's by construction. So the rule which held the company liable, in the *New York and New Haven case*, to *bona fide* holders of the spurious certificates, would certainly have held Schuyler, the agent who perpetrated the fraud, also liable. It was

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also decided in this case, that, to entitle a party holding spurious certificates to sue, no privity was necessary, except such as was created by the unlawful act and the consequential injury. (*See also Gerhard agt. Bates*, 20 Eng. Law and Eq. 129.)

In *Thomas agt. Winchester* (6 N. Y. 397), the action was for negligence, charging the defendant with carelessness in labeling a deadly poison as a harmless medicine, and sending it so labelled into market. The poison was sold by the defendant to Aspinwall, and by Aspinwall to Foord, and by the latter to Thomas, the plaintiff, who administered it to his wife. The objection was taken that the action could not be sustained, as the defendant was a remote vendor of the article, and there was no connection, transaction or privity between him and the plaintiff, or either of them. The objection was not sustained, and it was held that the defendant was liable for improperly and negligently labeling the poison as a harmless medicine, and sending it forth into market so labelled. The defendant would have been none the less liable if the illegal act had been intentional and willful, instead of negligent merely.

It necessarily follows, from the doctrine established by the above cases, that the defendants, having issued the false certificates of stock, authenticated by them as genuine, and cast them upon the market with fraudulent intent, are liable to every holder to whose hands they may come by fair purchase. The learned judge was right, therefore, in refusing to charge as requested.

We are cited to the case of *Seizer agt. Mali* (32 Barb. 76), as an authority against the theory adopted by the judge at the circuit. It will be seen, however, from the views above expressed, that the principles recognized in *Seizer agt. Mali* are not here at all impugned. But we are of the opinion that they were not there well applied. The same question was discussed in *Cazeaux agt. Mali* (25 Barb. 578),

Reynolds agt. Reynolds.

by Mr. Justice MITCHELL, whose views and conclusions are approved.

The judgment should be affirmed.

All concurred in the above opinion except HUNT, J., who dissented, and PARKER, J., who passed no opinion.

Affirmed.

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COURT OF APPEALS.

MABEL REYNOLDS, respondent agt. SCHUYLER REYNOLDS, appellant.

In an action for a separation from bed and board forever, on the ground of cruel and inhuman treatment, the *continuance of cohabitation* by the parties for a limited time, after the last act of cruelty proved, is not, as in the case of an action for divorce, conclusive of the fact of condonation.

January Term, 1867.

THIS is an action for a separation from bed and board forever, on the ground of cruel and inhuman treatment.

PARKER, J. The defendant, in his answer, denied the cruel and inhuman treatment alleged in the complaint, and set up that after the alleged committing of the several acts complained of, the plaintiff had, from October, 1857, to April, 1858, continued voluntarily to cohabit with him. The referee found that the defendant had been guilty of cruel and inhuman treatment of the plaintiff, and of such conduct towards her as to render it unsafe and improper for her to cohabit with him; and that said treatment and conduct had not been forgiven by the plaintiff; and that the plaintiff is entitled to judgment decreeing that the plaintiff and defendant be separated from bed and board forever.

These findings are fully warranted by the evidence of specific acts of cruelty and inhuman treatment, and of the circumstances under which the plaintiff continued to cohabit

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with the defendant after the last act of cruelty proved. Such continuance is not in this case, as it would have been in an action for divorce on the ground of adultery, conclusive of the fact of condonation. In that case the statute makes it so, but not in this. (2 R. S. 45, § 42, 1st ed.; *Johnson agt. Johnson*, 4 *Paige*, 460; S. C. 14 *Wend.* 637; *Whispell agt. Whispell*, 4 *Barb.* 217; 2 R. S. 147.)

As the case stands now, therefore, the conclusion of the referee that the plaintiff is entitled to judgment is unimpeachable.

The exceptions taken upon the trial appear, from the report of the case before the general term of the supreme court, not to have been there presented. They were all except one, which was grounded upon a refusal to non-suit the plaintiff, to the admission of evidence. The evidence objected to was, in each case, so clearly competent, that the defendant's counsel did well to abandon them then, as they do their whole case here, by failing to appear either to argue or submit their case.

The judgment appealed from is right, and should be affirmed with costs and an award of ten per cent upon the amount of the judgment, as damages for the delay produced by the appeal.

All affirm.

COURT OF SESSIONS.

In the Matter of the Application of EDWARD BOSWELL, for a writ of certiorari.

On an application for a *writ of certiorari* to remove a conviction from a court of special sessions to the court of sessions, it is not a valid objection to the conviction, to state in the affidavit:

1st. That the conviction is erroneous, for there was no complaint or affidavit in writing under oath, made against the defendant before the issuing of the warrant, upon which he was arrested.

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It is not necessary that complaint be made in writing in any case, before the issuing of the warrant.

2d. That there was no *complaint on oath* made before his arrest and the issuing of the warrant.

Warrants issue on *examination* made by the magistrate, and not on complaint or oath, as such, and complaints are not required to be on oath, although the examination must be.

3d. That the magistrate failed and refused to reduce the testimony given, or any part thereof, to writing.

It was not the duty of the magistrate to reduce the testimony to writing; it was necessary for his own protection, and for other reasons besides this, he ought to have so reduced it. But the defendant could not be injured by such omission; nor could his legal rights be affected by it.

4th. That the magistrate failed and refused to note any *exceptions* made by the counsel of said defendant.

Exceptions were entirely unnecessary on the trial of this defendant. Any erroneous ruling of the justice whatever, against the objection of the party, would have been sufficient to bring the error to the notice of the appellate court. Besides formal exceptions are never taken in any court not of record.

5th. That said trial, examination, conviction and sentence of said defendant, took place and were had in a *private room*, and not in public, nor in the usual court room of the magistrate, and without the consent of the defendant.

A trial is not necessarily not public, because it is conducted in a private room, or is not in a court room. The trial in this case, was conducted in a room adjoining part of the regular court room of the justice in the city hall, and is used for public purposes: it being in fact the office of the justice, in a public building, furnished to him by the public for the transaction of public business.

The statute providing that the sitting of every court in this state shall be public, and every citizen may freely attend the same, was not violated in this case.

TROY, J. In the matter of the application of Edward Boswell, for a writ of *certiorari*, to remove a conviction had before a court of special sessions. Application is made to me on behalf of one Edward Boswell, to remove into the court of sessions of this county, a conviction had before a court of special sessions, on the 15th day of January instant, held by James M. Cornwell, police justice, of the city of Brooklyn, and two affidavits are presented in support of such application, one made by John S. Applegate, the attorney of the party, and the other by himself.

The affidavit of the attorney states that Edward Boswell was arrested on the 5th day of January, 1868, charged with an assault and battery upon Eliza Boswell, and that on the 15th day of January, 1868, he was tried for the offense committed, and sentenced to imprisonment for twenty days

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without any fine ; that the conviction is erroneous, for there was no complaint or affidavit in writing under oath, made against Boswell, before the issuing of the warrant upon which he was arrested.

2d. There was no complaint on oath made before his arrest and the issuing of the warrant.

3d. The magistrate failed and refused to reduce the testimony given, or any part thereof, to writing.

4th. The magistrate failed and refused to note any exceptions made by the counsel of said Boswell, defendant.

5th. Said trial, examination, conviction and sentence of said defendant Boswell, took place, and were had in a private room, and not in public, nor in the usual court room of the magistrate, and without the consent of the defendant.

This affidavit is made on information and belief.

The affidavit of Boswell, sworn to before the person who makes the other, states that the trial did not take place, nor was the same had in public, or in the usual court room of the justice; but was in private and in a private room, and was so had without his consent and against his wishes; that he was not requested by the magistrate to elect as to whether he would be tried by a court of special sessions, or (as he terms it) general sessions ; that he had in court several witnesses who well knew the character of the complaining witness for truth and veracity and chastity, and who would, as he believes, had they been permitted to be present and testify on the examination or trial, have impeached the prosecuting witness and rendered her testimony unworthy of belief, that he is not guilty of the charge of which he is convicted.

As I have had a number of applications made to me to remove convictions had before magistrates, none of which applications were ever justified by the affidavits presented, and all of which I refused, and as there seems to be a prevailing opinion that all such convictions can be removed, as a matter of course, I desire, by calling attention to the stat-

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ute upon this subject, to correct this erroneous supposition.

The law provides that a writ of *certiorari*, to remove into the supreme court a conviction had before a court of special sessions, may be allowed on the application of the party convicted by any justice of the supreme court, or by any officer authorized to perform the duties of such justice in vacation.

That the party desiring such *certiorari*, or some one in his behalf, shall apply for the same within ten days after such conviction shall have been had, and shall make an affidavit specifying the supposed errors on the proceeding or judgment complained of.

It is further provided that if the officer to whom application for such *certiorari* shall be made, shall be satisfied that any error has been committed in the proceedings, or the judgment, he shall indorse upon the writ his allowance thereof, and certify the affidavits upon which it was allowed. But when the trial was by jury no *certiorari* shall be allowed, upon the grounds that the verdict was against evidence. The law goes on further to provide for the service and return of the writ, manner of proceeding, staying proceeding, bailing, &c.

This law is not to be found in the 5th (last) edition of the Revised Statutes, nor in Edmonds' Statutes, but it will be found in the 4th edition of the Revised Statutes, vol. 2, page 902 (*art. 4, chap. 2, part 4, title 3*).

This statute was repealed in 1857 (see *Laws 1857, chap. 769*), and in 1859 (see *Laws of 1859, chap. 339*), the act of 1857 was repealed, whereby the old law was restored, and the court of sessions of the several counties were given, within their respective counties, the same powers as the supreme court in such cases.

It will be seen, therefore, that before granting the writ it is necessary that the officer to whom the application is made, be satisfied that error was committed in the proceedings or the judgment, and as I understand it, if such error exists, it is his absolute duty to allow the writ; but if he is not

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satisfied that any error has occurred, it is equally his duty to refuse such allowance. He has no discretionary power in the matter whatever.

1st. The first alleged error in the affidavit of the attorney in this case cannot be seriously urged, as it is not necessary that complaint be made in writing in any case before the issuing of a warrant.

2d. To the second alleged error, that no complaint on oath was made before the issuing of the warrant, it is sufficient to say that warrants issue on examination made by the magistrate, and not on complaint or oath as such, and complaints are not required to be on oath, although the examination must be. (*See Bradstreet agt. Ferguson*, 23 Wend. R. p. 639; *Payne agt. Barnes*, 5 Barb. S. C. R. 466; *Stewart agt. Hawley*, 21 Wend. R. 555; *Bradstreet agt. Ferguson*, 17 Wend. 62; 2d Rev. Stat. Edm. ed. 729.)

It is perfectly consistent with the statement in the affidavit that "no complaint was made on oath," that a complaint was made without oath, and an examination afterwards made by the magistrate under oath. As this was the duty of the magistrate, who is a sworn officer, experienced and usually careful, I cannot suffer the presumption in favor of the legality of his proceedings to be affected by an affidavit, made as this is, on information and belief, and which sets forth no reason why it is thus made, or who furnished the information, when, if the fact really was that the justice took no such examination, a positive affidavit upon that point could easily be procured. The affidavit, however, is entirely silent as to an examination on oath previous to issuing the warrant.

It would not alter the case, so far as relates to the conviction, if the warrant had been illegally issued for the improper and unauthorized apprehension of the party. The justice might, by issuing a warrant without any proof, have rendered himself liable, both civilly and criminally; but apprehension and conviction are different and distinct stages of procedure. The mere fact that a person has been illegally apprehended,

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does not exempt him, even while illegally restrained, from a legal accusation then made for the first time, or a trial and conviction upon such charge afterwards. I notice that the affidavit is very careful to use the language, *before* the issuing of the warrant. It is perfectly consistent with this statement that a sworn charge was made immediately *after*, and the very use of the word "before" would seem to imply this. The affidavit is certainly not remarkable for candor or the amount of information it furnishes.

3d. It was not the duty of the magistrate to reduce the testimony to writing, it was necessary for his own protection; and for other reasons besides this, he ought to have so reduced it. But how was the defendant injured by this? Instead of injuring him, it gave him an advantage such as seldom presents itself, and, judging from the affidavits in this case, he might have made effectual use of it. He might have taken the testimony, if the justice did not; and if it became requisite to review it, there is but little doubt that an appellate court would compel the magistrate to return the testimony as written at the time by the defendant, in preference to the mere recollection of the justice as to what occurred. It may be that the defendant missed his advantage, and that the justice subjected himself to difficulty, but the omission (assuming the affidavit to be correct) did not affect the legal rights of the defendant, and constitutes no error of which he can now take advantage.

4th. The magistrate did not note the defendant's exceptions. This is to be regretted, as they may have been numerous, if not important. But it does not seem to have occurred to the defendant or his attorney, that the statement in his affidavit of one sound objection to the admission or rejection of testimony on the trial would be vastly more useful to him than to complain of the magistrate for not noting exceptions which he does not swear he took.

I never heard of a bill of exceptions in a court not of record. Exceptions may be reduced to writing on the trial

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of civil cases or indictments by the party taking them at the time, or entered in the minutes of the judge, and afterwards settled as provided by the rule of each court; but the judge is not under any obligation to enter them in his minutes, and it is no error if he refuses. The party even here must note his own exceptions.

Exceptions were entirely unnecessary on the trial of this defendant. Any erroneous ruling of the justice whatever, against the objection of the party, would have been sufficient to bring the error to the notice of the appellate court.

5th. A trial is not necessarily not public because it is conducted in a private room, or is not in a court room. The trial in this case was in a room joining part of the regular court room of the justice in the city hall, and is used for public purposes; it is, in fact, the office of the justice, in a public building furnished to him by the public for the transaction of public business. The defendant had counsel on the trial, "whose exceptions were not noted." It is not alleged that any person was refused admission; nor does it appear that the defendant and his counsel made any objection, although the defendant says it was against his wishes and consent. Did he intimate any wish or desire on the subject? He certainly does not say so. The statute provides that the sitting of every court in this state shall be public, and every citizen may freely attend the same. I cannot see that the statute was violated in this case; and if it was, unless it affected the defendant's rights, it forms no reason to reverse the conviction. It is evident to me that he was not excluded on the occasion, and suffered no wrong that I can ascertain from the affidavit presented.

It is a little singular that the affidavit, which professes to state what occurred on the trial, is made by a person not present on such trial, and is on information and belief, while the affidavit of the defendant, who was present and must know what occurred, is entirely silent upon the subject.

It does not appear that the defendant requested to be tried

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by a court of special sessions; in fact, he says this in so many words, and he omitted, from the 5th of January to the 15th, to offer bail for his appearance at the next criminal court. It does not appear that the magistrate required him to give such bail, but in the city it is unnecessary that he should do so (§ 33 of *chap. 102, Laws of 1850*). By the failure of the defendant to offer such bail, it became the duty of the court of special sessions to try him on the charge; and that he was properly so tried and convicted I have no doubt.

The affidavits presented to me in this case are of a negative rather than affirmative character, to say the very least that should be said about them; but in this respect I regret to say they differ very little from any affidavits presented to me as yet on similar applications. They are so drawn that no person, however unsuspecting, can read them without feeling the necessity of avoiding the construction intended to be conveyed. In the first place, it is said that the party was arrested on a charge which is distinctly specified; and yet the idea would seem to convey that no charge was made before the warrant issued. It is said that the trial took place in private, and witnesses would have testified if permitted, &c.; yet it is not averred that any person was excluded, or any witness rejected or offered on the part of the defendant. No information is furnished as to whether the defendant was arraigned on the 5th of January, when arrested, nor are we told how he pleaded.

Yet he must have been so arraigned, and he must have pleaded not guilty; otherwise a trial would not have been had, but he would have been convicted then and there. The case must have been adjourned, for it was not tried until the 15th of January; and if, on his plea of not guilty, the case was adjourned for trial before the special sessions, it would seem rather strong evidence of an election by him to be thus tried. There is no single error mentioned as having occurred upon the trial. I am entirely satisfied that no error occurred in the proceedings, and no error in the judgment, of which

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the defendant has any right to complain; for the sentence was imprisonment for only twenty days in the county jail. It is just possible that, if the defendant had elected to be tried by the next criminal court, and should be convicted, the whole penalty of the law, both fine and imprisonment, might have been inflicted; and the defendant may have reason to congratulate himself that he was not thus punished.

In fact, I am inclined to believe that it will be always better for persons charged with offenses which can be tried in the special sessions, to avail themselves of the opportunity, unless there is some good cause for adopting a different course. I am persuaded, from what experience I have had, and the practice under this statute for the removal of convictions, that applications of this description should be strictly scrutinized; and while I shall always feel a pleasure in affording an opportunity of review whenever error has intervened, it will be entirely useless to present affidavits such as are submitted to me in this case for similar purposes, as all such applications will be, like this, denied.

COURT OF APPEALS.

CHARLES PITTR and WILLIAM PITTR, appellants agt. ERASTUS DAVISON, impleaded with JOSEPH DAVISON, respondent.

1. Under the statute (2 Rev. Stat. 534, O. P. § 5), relative to contempts, two methods of proceeding against a party who is guilty of a contempt in refusing to obey a judgment in a civil action are provided:
 - (1.) The court shall either grant an order on the accused party to show cause why he should not be punished for the alleged misconduct; or,
 - (2.) Shall issue an attachment to arrest such party, and to bring him before the court to answer for such misconduct.
2. If the proceeding by attachment is adopted, the party is to be arrested and to be personally brought before the court, unless he gives bail. On being brought before the court, or appearing pursuant to his bail bond, interrogatories are to be filed and administered, if he denies the contempt.

Under this mode of proceeding, no order for punishment of the accused by fine or

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imprisonment can be made, unless he shall have been personally brought before the court, or voluntarily appeared there.

3. If the proceeding by order to show cause is adopted, and it is to enforce a civil remedy, if the party in default has already had the opportunity of contesting his liability to perform what the proceeding seeks to compel him to perform, such proceeding is in effect but the execution of the judgment or order against him.
3. It is a proceeding in the action, and all the papers are to be entitled in the action. The order to show cause, in the absence of any statutory provision to the contrary, is governed by the practice of the court in regard to orders to show cause, both in respect to its service and the further proceedings upon it.
Under such practice, it is good service to serve it on the accused party's attorney in the action, even after judgment.
5. Under sections 418 and 285 of the Code, the papers to bring the party into contempt, necessary, in this case, to be personally served on the defendant, are the certified copy of the judgment and the summons, and the underwriting of the referee requiring the defendant to appear before him and make the conveyance.
When these are personally served, if the defendant refuses to comply, he is brought into contempt.
6. The 12th section (2 R. S. 278, O. P.), which provides that "contempts committed in the immediate view and presence of the court may be punished summarily, and in other cases the party charged shall be notified of the accusation, and have a reasonable time to make his defense," is by the succeeding 14th section held not to apply to any proceeding against parties or officers, as for a contempt to enforce any civil right or remedy.
7. In a proceeding by order to show cause, interrogatories are not necessary; for, if the court have obtained jurisdiction of the person of the defendant in the manner above provided, it retains that jurisdiction, for all purposes of enforcing the judgment, until its requirements are fully performed and executed.
8. After judgment obtained, no matter what would have constituted a defense to the judgment, and if in due time and manner brought before the court would have prevented it, can be allowed as a reason why it should not be enforced.
9. There is a manifest distinction between proceedings to enforce criminal contempts and those to enforce civil remedies.
10. The case of *Pitt agt. Davison* (37 Barb. p. 100) reversed, and *Pitt agt. Davison* (12 Abb. p. 385) affirmed), and *Davison's Case* (13 Abb. p. 129) sustained.

December Term, 1867.

ON APPEAL from the first judicial district.

This case arose on an appeal from an order made by the general term of the first judicial district, after final judgment reversing an order made by Mr. Justice SUTHERLAND, likewise after judgment, so far as it denied a motion to discharge the respondent, Erastus Davison, from arrest; and also setting aside the commitment of the said Davison, and discharging him from imprisonment.

Judgment had been rendered in this action on a report of referee, that the defendants specially perform their contract

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with the plaintiffs, to convey to them a house and lot in Twenty-sixth street, New York, estimated, at the time of the motion below, to be worth \$10,000, and for which plaintiffs had principally paid.

It was rendered on the 7th day of May, 1856. *It was never appealed from.* A certified copy of this judgment was personally served on the defendants, with a summons to attend before the referee, Mr. Cambreleng, to carry into effect the decree, by executing the conveyance in accordance with the judgment.

On the 27th June, 1856, the parties attended before the referee. The plaintiffs, with their counsel, offered to perform what was required of them in the decree, and requested the defendants, who were then and there represented by counsel, to perform their part of the decree.

In excuse of performance, the defendants set up, by their affidavits, matters alleging their inability to comply. These excuses appear in the opinion. The referee overruled their excuses, and they then refused to comply. The referee, on the 30th June, 1856, made a special report to the court of what transpired before him on the 27th June, 1856, annexing the defendants' affidavits.

On that report, and on the judgment roll, Mr. Justice DAVIES (at that time in the supreme court) granted an order for the defendants to show cause why an attachment should not be issued against them, and they be punished for their alleged contempt and misconduct in disobeying the decree. The plaintiffs' counsel tried for seven months to have the papers served on the defendants personally, but without avail. As they had absented themselves to avoid service of process, the judge ordered the papers to show cause to be served on their attorney. After the papers were served, an adjournment was procured by defendants' attorney, to enable the latter to communicate with his clients, which he did, and he was instructed by Erastus Davison to defend the motion. That motion was heard and fully discussed before Mr. Justice

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DAVIES, who, on the 30th day of December, 1857, made an order of commitment of the defendants until they should comply with the decree and convey the premises in controversy. On that motion before Mr. Justice DAVIES, counsel appeared for the defendants and opposed the relief sought by the plaintiffs below; but Mr. Justice DAVIES overruled his objections, and adjudged the defendants to be guilty of a contempt.

No appeal was taken from this adjudication. The defendants kept out of the way for nearly three years, until early in November, 1860, Erastus Davison was arrested under a writ of habeas corpus issued in pursuance of that order, and committed to Eldridge street prison, where he was until the decision of the General Term.

After being arrested, the defendant Erastus Davison made various applications to be discharged, which are reported in 12 Abb., p. 385 and 13 Abb., p. 129.

The defendant finally moved, before Mr. Justice SUTHERLAND, for his discharge, who denied the motion to discharge without costs and without prejudice, and with leave to the defendant Erastus Davison, to renew his motion, and at the same time, or prior to its renewal, to further move the court to modify, change or amend the original judgment, so as to put in evidence certain facts, and to change the judgment from a judgment for specific performance into one for damages.

The defendant Erastus Davison appealed from the denial, and the general term *reversed the order denying the motion to discharge, set aside the order of commitment, and discharged the defendant E. Davison from imprisonment.*

From this order of reversal the Messrs. Pitt, the plaintiffs below, appealed.

D. McMAHON, *for appellants.*

I. The order of reversal by the general term is appealable,

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because it is a final order affecting a substantial right made upon a summary application, in an action after judgment. (*Betts agt. Garr*, 25 N. Y. R. 383; *Clarke agt. City of Rochester*, 34 N. Y. R. p. 356, *opn.*)

II. The judgment in this action was for a specific performance, and a conveyance by good and satisfactory title, in fee simple, discharged from all liens and incumbrances, of a house and lot in Twenty-sixth street, New York.

The power to enforce such a judgment by the supreme court in equity is given:

1st. By the practice and decisions in the court of chancery (*Ludlow agt. Lansing*, *Hopk. Ch. R.* 231);

2d. By the Revised Statutes (2 R. S. 355, § 56, 4th ed. O. P. 187, § 104; 2 R. S. 768, O. P. 535, § 1, sub. 3, 4th ed. sub. 8; 2 R. S. O. P. 535, § , sub 8, 4th ed. p. 769);

3d. By the Code, section 285, which provides that, where the judgment requires the performance of any other act than the delivery of the possession of real or personal property, or the payment of money (which is this case, because the judgment here requires the specific performance of a contract) after certified copy of the judgment *has been served on the defendant*, and he refuses to comply, the court may punish him for a contempt.

III. The steps of the plaintiffs, to procure a performance of the decree by the defendants of the acts required in the judgment, were regular.

(a.) The plaintiffs served a certified copy of the judgment on each of the defendants *personally*, at same time, with a summons to attend before Mr. Cambreleng, the referee, to carry into effect the decree. The judgment directed and gave power to the referee to carry it into effect in that respect.

The defendants, by counsel, attended before the referee, and tried to show matters which was in impeachment of the decree. The referee made a special report of the facts to the court.

(b.) the plaintiffs procured, then, an order from Justice

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DAVIES, for the defendants to show cause why they should not be punished as for a contempt in not complying with the decree. Judge DAVIES ordered that service should be made on the defendants by serving their attorneys. They admitted service, and procured an adjournment to see their clients. In the meantime they saw their clients, *attended on the adjourned day, and opposed* the motion. Judge DAVIES overruled the opposition and made the order of commitment.

The appearance of Wetmore and Bowne in opposition to the motion gave jurisdiction to the court, after the judgment had been personally served. (*Mahony* agt. *Penman*, 1 Abb. P. R. 35; *Flynn* agt. *Hudson R. R. Co.* 6 How. p. 308.)

(c.) By section 285, all that is required to bring a party into contempt is to serve a certified copy of the judgment personally on the party defendant. The Code seems to provide for no other proceeding other than when a refusal to comply with the judgment appears, the court shall punish for contempt.

(d.) The statute as to contempts does not require imperatively that written interrogatories must be put; an order to show cause is enough. (*Albany City Bank* agt. *Schermerhorn*, 9 Paige, 372; *Wilson* agt. *Fitzsimmons*, 5 Duer, 629, affirmed in court of appeals, Dec. 31, 1858; see affirmance alluded to in *McCartan* agt. *Van Syckel*, 10 Bosw. 697; *Taylor* agt. *Baldwin*, 14 Abb. 166; *Clapp* agt. *Lathrop*, 23 How. 433, opn. 441; *Brush, ex'r* agt. *Lee*, affirmed at June Term, 1867, court of appeals.)

A court of chancery might always commit on affidavits, without first putting interrogatories. (*Yates' Case*, 9 Johns. p. 395; decree overruling *Yates* agt. *The People*, 6 Johns. 337; decree affirming *The Yates Case*, 4 Johns. 317.)

So a court of chancery have, when a defendant has designedly kept out of the way, specified that the mode of service to bring him into contempt might be on his attorneys, instead of being on him personally. (*Albany City Bank* agt. *Schermerhorn*, 9 Paige, 372.)

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(e.) The proceedings were properly entitled in the cause. (*Brown* agt. *Andrews*, 1 *Barb.* 227; *Stafford* agt. *Brown*, 4 *Paige*, 360; *People* agt. *Craft*, 7 *Paige*, 325.)

IV. Judge DAVIES' order of December, 1857, was a direct adjudication, as well on the subject of the defendants' contempt as on the regularity of the adjudication on that contempt. It could have been appealed from; it cannot be collaterally impeached on the ground of irregularity. (*Higbie* agt. *Edgerton*, 3 *Paige*, 253; *White* agt. *Merritt & Wheaton*, 3 *Seld.* 352.)

The court of chancery have, in a number of equity cases, held a party for contempt in disobeying orders of which he had notice, even though not subpoenaed nor served on him. (*People* agt. *Brower*, 4 *Paige*, 405; *Hall* agt. *Thomas*, 3 *Edw.* 236; *People* agt. *Compton*, 1 *Duer*, 512.)

(a.) The statute on contempts contemplates two modes of procedure:

1. By preliminary arrest and putting interrogatories;
2. By order to show cause, in which case the personal attendance of the party is not required. (*Albany City Bank* agt. *Schermerhorn*, 9 *Paige*, 372.)

The latter course was here adopted. It appeared to the court that the defendants were absenting themselves from the state. They then prescribed the service to be made on the attorneys. This the court could do. (*Albany City Bank* agt. *Schermerhorn*, 9 *Paige*, 372; *Watson* agt. *Fitzsimmons*, 5 *Duer*, 629; *Case of Yates*, 4 *Johns.* 317; *Yates* agt. *Lansing*, 9 *Johns. R.* 395.)

(b.) It is to be presumed that every objection was taken on the 30th December, 1857, to the adjudication of Justice DAVIES, by defendants' counsel, and that the same was passed on by Justice DAVIES. It is therefore *res adjudicata* in this case, and cannot be disturbed, even if the learned judge erred. (*Higbie* agt. *Edgerton*, 3 *Paige*, 253.) If not so taken by the defendants' counsel, it is waived.

(c.) There is a manifest distinction between criminal con-

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tempts and the conviction of a contempt in a proceeding to enforce a civil remedy. (See *Lansing agt. Easton*, 7 *Paige*, 364, 367, *opinion*; *Conover agt. Wood*, 5 *Abb.*, 84, *p. 88, opinion*; *People agt. Compton*, 1 *Duer*, 512.)

(d.) The jurisdiction of this court at special term, at the time Justice DAVIES made his order, must be presumed, it being a court of general jurisdiction.

In commitments for contempt, where the imprisonment is intended as a punishment for the offense, it should specify some definite time; but where it is designed to compel obedience to an order of court, it should be only so long as the contumacy continues. (*Goff's Case*, 3 *Maule & Selw.* 203; 1 *Burns*, 382; *Hurd*, 415; 2 *Rev. Stat. O. P.* 538, § 23, *p. 774, 4th ed.*)

V. The excuses set up as a reason why the defendants did not comply with the decree were inadmissible to relieve the defendant from his contempt, and were properly disregarded by the referee and overruled by Justice DAVIES.

(a.) These facts were complete before the judgment, and before the referee's report was made upon the issues in the cause.

The defendants having omitted to make this defense in the action to prevent the judgment, cannot make it to frustrate the judgment by preventing its execution. Any such excuses could have been set up by the defendants *before judgment, if there was any validity to them*, by leave of the court, on supplemental answer. (§ 177 *Code*.) Those excuses were set up before the referee and before Mr. Justice DAVIES, who made the order of 30th December, 1857, and were by them overruled.

VI. The defendant was not without remedy to be relieved from his imprisonment. His remedy was:

1st. To comply with the course pointed out by Justice SUTHERLAND in his opinion; or,

2d. To move, under the act of 1843 (*Laws of 1843, p. 8*);

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to be relieved from imprisonment, on the ground of his utter inability to comply with the decree;

3d. By conveying the house in question by a good and satisfactory title, or by giving a good and satisfactory compensation for it.

VII. The decision of the general term below, reported in *37th Barb. Sup. Court Reports*, 97, proceeded on the substantial propositions that interrogatories were indispensably requisite to be put to the defendant, before a contempt could be committed.

The following cases cited, dispose of that position, viz.: *Albany City Bank* agt. *Schermerhorn* (9 *Paige*, p. 372); *Watson* agt. *Fitzsimmons* (5 *Duer*, 629). Affirmed in December term, 1858; affirmance alluded to in *McCartan* agt. *Syckel* (10 *Bosw.* 697); *Taylor* agt. *Baldwin* (14 *N. Y. R.* 166); *Clapp* agt. *Lathrop* (23 *How.* 423); *Brush, Ex'r* agt. *Lee*, affirmed in June term, 1867, court of appeals.

It further proceeded on the substantial proposition, that a personal service of the order to show cause on the party was necessary, or that he should appear personally in court in compliance with it.

The case of the *Albany City Bank* agt. *Schermerhorn* (9 *Paige*, p. 374), decides, that where the party proceeds by an order to show cause, copies of the order, &c., must be served on the defendant *or his solicitor*; and if the party accused does not appear on the day appointed, the court may at once proceed to make a final decision, that the accused has been guilty of the contempt charged. It prescribes the form of commitment substantially like the one here.

The *Code* (§ 285), is in analogy with this. It requires the certified copy of the judgment to be served on the defendant *personally*; on his refusal the court may at once punish for contempt.

In the case at bar the certified copy of the judgment was so served. The defendant was personally summoned to

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appear before the referee, to whom, by the judgment, was referred the matter of carrying out the decree.

The defendants *personally attended* before the referee, also by counsel, set up the same excuses there as they set up below. There they refused compliance with the decree.

The referee reported the whole facts to the court, also the excuses set up.

The proceedings in the case at bar were deliberate. The defendants had every notice consistent with a due regard to their liberty.

The general term below further proceeded on the ground that the order to show cause, was defective in this, to wit: "The order to show cause allowed by the statute, is to show cause why he should not be punished for the alleged misconduct, succinctly and plainly specifying the nature of this application."

The order in this cause cites the defendants *to appear and show cause why an attachment should not issue against them, and they be punished for the alleged contempt and misconduct.*

All that the plaintiffs in the action below by their proceeding desired, was an enforcement of the judgment, so that the words "why an attachment should not be issued against them," might have been stricken out and the remaining clause would have been sufficient upon which to have based the action of the court, for then the order would have called upon the defendants to have "shown cause on the given day and at the given place before the court, why they should not be punished as for a contempt, language directly within the purview of section 285 of the Code.

But the order to show cause is in substance and effect, without striking out any part of it, an order for the defendants, on the time and at the place mentioned, to show cause why they should not be punished for the contempt and misconduct alleged, and why an attachment should not be issued against them for that purpose, (which attachment in point of fact, was the award of the punishment.)

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The reason which the general term gives for their view of the point suggested, seems to be untenable. They say, "that such an order may have been very easily understood by the defendant as meaning that an attachment would be applied for as preliminary to proceedings for the punishment of the alleged misconduct." This could not be, inasmuch as the relief sought was double, viz.: that "*why an attachment should not be issued, and they be punished for the alleged misconduct,*" words sufficiently plain to convey the required meaning.

The general term say further, that the defendant might justly have conceived, as the statute provides, that when the party is brought before the court upon an attachment, interrogatories shall be filed against him, to which he would have the right of making written answers on oath, and presenting sufficient reasons for not complying with the decree.

No defendant has a right to speculate that the court will give him an opportunity to put at defiance its judgments, by setting up plausible excuses for not obeying its decrees, and as the decisions are now, interrogatories may be dispensed with, it follows, that this view of the general term is untenable. But the conclusive answer to the general term lies in this, that the criticisms upon the order to show cause, belonged to the court before whom it was returnable, (viz.: Mr. Justice DAVIES), not to the general term below.

The general term further proceed in their opinion and in discussing, that it is necessary to have interrogatories put to the defendant, admit that there are some exceptions to the rule, which exceptions are confined to cases where the party admits the misconduct in open court, or where, if he denied it, the denial of the facts, would nevertheless leave him guilty of the offense.

The general term overlooked this fact, viz.: that the *decret in the action in the court below referred the direction of executing the decree to the referee, on whosc report the judgment was entered. That referee stood quasi the court. Before*

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him appeared the defendants, and in effect admitted their contempt by refusing to perform the decree. It was to that extent an admision in open court in the very cause.

The referee reported the facts, and on his report the court acted. The whole proceeding was in effect before the court.

By analogy, where the judgment directs the absolute performance of an act, and it appears affirmatively to the court, that the defendant does not or refuses to perform the act, it is unnecessary to bring the party in person before the court, or to file interrogatories.

In *People agt. Brown* (4 Paige, 405), which was an order to deposit a deed with the master, where it appeared that the defendant had knowledge of the order, although only served on his solicitor, the court held, that they had power to punish as a wilfull disobedience.

The general term finally conclude their opinion by alleging, that there is a fatal defect, viz.: that the court had no jurisdiction of the person. To sustain this, they cite *People agt. Nevins* (1 Hill, 158). Upon examining that case it will be found, that it affirms the power of the superior courts of record to commit by rule, without process. In the case at bar, we have both. (See 1 Hill, pages 166 to 170.)

It also repels the idea, that the proceedings of a superior court of record can be attacked collaterally.

"That a rule of a court of record, that a defendant be committed for contempt, need not recite the prior proceedings. If it is such a rule as the court might legally make under any supposable state of circumstances, all jurisdictional steps, and matters of regularity are to be presumed."

Is a defendant's personal attendance necessary in court before he can be committed for a contempt? We submit not.

1. As to to a criminal contempt it is not, because by the statute a criminal contempt is a misdemeanor. (See 2 R. S. 692, § 14, O. P. 875, 4th ed.; *Degree of Punishment*, 538, §§ 221 to 225.) If a misdemeanor, the parties personal pres-

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ence is not even necessary during the trial. (See 2 R. S. 735 O. P., § 13, 4th ed., p. 918.)

2. As to a civil contempt, so long ago as *People agt. Van Wyck* (2 Caines, 333), the supreme court held it unnecessary on an order, to show cause for the party sought to be charged with the contempt, to appear in person, and they overruled on that point. (*People agt. Freer*, 1 Caines, 485; *People ex rel., Greeley agt. Court of Oyer and Terminer*, 27 How. P. R. 14.)

Mr. Justice DAVIES had power to provide that the order to show cause, should be served on the defendants' attorneys. (See *Albany City Bank agt. Schermerhorn*, 9 Paige, 372; *Stafford agt. Brown*, 4 Paige, 360.)

Such power has been frequently exercised by the old supreme court and court of chancery. (See cases lastly cited.)

What was the effect of the admission of the defendants' solicitor of the service of those papers (see fol. 138).

Section 417 of the Code provides, that where a party shall have an attorney in the action, the service of papers shall be made on the attorney instead of the party. Under this section the supreme court in *Drury agt. Russell* (27 How. P. R. 130), held it good service to serve the papers on a motion to set aside an attachment and an order for publication, on the plaintiffs' attorney in the action, although more than four years had elapsed since the judgment had been entered.

What was the effect of the attendance of the defendants' solicitor in open court, on the 18th December, 1857, and his procuring an adjournment of it until the 31st December, 1857, and his then opposing the motion?

In *The People ex rel. Greeley agt. Court of Oyer and Terminer of New York* (27 How. 14), the special term, MARVIN, J., held, that the party charged with the alleged contempt might appear and answer by counsel, which had the same effect as if he were present, and cited *People agt. Van Wyck* (2 Caines R. p. 333).

In *Hollingsworth agt. Duane* (Wallace, Sen'r R. p. 78), the

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court held, that the defendant may defend himself on the order to show cause in person or by counsel, and that interrogatories could not be awarded unless he asked for them.

Was it necessary for the plaintiffs, after serving the certified copy of the judgment on the defendants, under section 285, and then getting a personal refusal from the defendants to comply with it, to serve the subsequent papers personally on the defendants?

The general term also failed to consider one matter very controlling, viz., that when the defendants are chargeable with notice of the order or decree they violate, they may be punished as for a contempt, even though the papers are not personally served. This has often been done in the old courts of chancery, in cases of violation of injunction orders. (See *People agt. Brower*, 4 *Paige*, 405; *Hall agt. Thomas*, 3 *Edw.* 236.) And by the courts since the Code. (See *People agt. Compton*, 1 *Duer*, 512; *Livingston agt. Swift*, 23 *How. Pr. R.* p. 1.)

E. F. BULLARD, for respondent.

The commitment was irregular, because the order to show cause was not personally served, and the defendant was not personally in court.

What is said about serving on the solicitor, in the cases cited on the other side, is *obiter*, as in each of those cases the question as to the manner of service was not before the court. (9 *Paige*, 372; 4 *Paige*, 378.)

The defendant also relies upon the points in reported case (37 *Barb.* 100), and also upon the opinion of Justice CLERKE.

The case quoted (2 *Barb. ch.* p. 278), saying that substituted service may be good, do not sustain that position.

In the case of *Weston agt. Faulkner* (2 *Price*, 2), the defendant tried to avoid service, and the order to show cause was served by throwing the paper into the window of his dwelling house.

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On application to the court *ex parte*, to direct the manner of service, the court remarked, "that service of such order at the dwelling house should be considered sufficient to ground the application for an attachment."

The court did not say that it would be sufficient to authorize a final decision.

It does not appear what proceedings were had in that case subsequently, and such *ex parte* authority is not sufficient to justify the order made below.

Again, no such facts were presented to the court in this case, upon which the order of December 9, 1857, was made. *Durant agt. Moore* (2 *Russell & My.* 33) expressly holds the service must be personal.

The final decree, in 1856, determined the suit, and the duty and authority of Bowne, as attorney for Davison, then ceased. (1 *N. Y. Pr.* 74.)

This proceeding may be likened to proceedings supplementary to execution. Who would claim that such proceedings could be served upon the attorney, instead of the party?

The constitution says the party cannot be deprived of liberty, except by due process of law. Who can assert that such proceeding was due process of law?

Whether substituted service, by publication or leaving at dwelling house, may be proper, does not arise in this case.

An injunction or other order, forbidding a party to do an act, may be served in any manner by which notice is brought to the knowledge of the party; but that rests upon a different principle. The order and notice secures the lien or rights of the other party, but does not punish the party for their violation.

There is no hardship in requiring personal service. The party cannot be punished until actually arrested, and then he could be brought into court and allowed to answer, if he could. (1 *Hoff. Ch. Pr.* 434; 1 *Abb.* 399.) That was not done in this case.

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By the court, PARKER, J. This is an appeal from an order of the general term of the supreme court, reversing an order of the special term, which denied defendant's motion to set aside a previous special term order specifying the defendant guilty of a contempt of court, and committing him therefor. The action was for the specific performance of a contract by which Joseph Davison agreed to convey certain premises to the plaintiffs. Judgment was rendered adjudging the plaintiffs entitled to a specific performance of the contract, and directing this defendant, to whom Joseph Davison had fraudulently, as against the plaintiff, conveyed the premises, to convey them to the plaintiff, free from any incumbrance which he had put upon them. A certified copy of the judgment was served upon the defendant personally, and he was duly required to appear before the referee named in the judgment, at a specified time and place, and make the conveyance under his direction. The defendant did not appear before the referee; but, at the time and place specified, his counsel appeared and offered to read an affidavit of the defendant, in excuse of his non-compliance with that part of the judgment which requires him to convey, showing that subsequently to the contract of the sale to the plaintiffs, but prior to the commencement of this suit, he mortgaged the premises for \$5,000, which mortgage, prior to the said judgment, was foreclosed and the premises sold; for which reason the defendant was unable to convey the premises to the plaintiffs. The referee refused to receive the affidavit as an excuse, and demanded a compliance with the judgment, which was refused. He then made his report to the court, showing the non-compliance of the defendant with the requirement of the judgment, and the reasons therefor set forth in said affidavit. Afterwards the plaintiffs obtained from a justice of the court at chambers an order requiring the defendant to show cause at a special term "why an attachment should not be issued against him, and he be punished for his alleged contempt or misconduct in not having conveyed," &c. This order was

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founded upon the judgment entered in the action, the summons and underwriting of the referee, requiring the defendant to appear before him and convey, the affidavit of service thereof, with a certified copy of the judgment and the report of the referee, and it contained a direction that it be served on the defendants' attorney. It was so served, but no service was made on the defendant personally.

At a special term, at which the order was returnable upon reading the judgment roll in the action, together with the said papers on which the order to show cause was granted, and the order to show cause with the admission of service of the same upon the defendant's attorney, and after hearing counsel for the respective parties, the court adjudged the defendant guilty of a contempt of court, in wilfully neglecting and refusing to comply with the terms and provisions of the judgment, and ordered that he be committed to the common jail of the city and county of New York, and there be closely confined and kept until he should comply with the requirements of the judgment. The defendant was subsequently arrested upon a precept issued pursuant to the order, and committed to jail. He then made the motion to set aside the order under which he was committed, and to be discharged from imprisonment, which motion was founded upon the papers on which that order was based, together with affidavits showing that he had no personal knowledge of the order to show cause above mentioned, until after the granting of the order directing his imprisonment. In opposition to the motion, affidavits were read on the part of the plaintiff showing, that after the referee had reported, and even nine months before the granting of the said order to show cause had been made, without any direction as to its service, and that after diligent search, the plaintiffs were unable to make personal service thereof; also controverting the fact stated in defendant's affidavit of his want of knowledge of this last order to show cause. This motion was denied at the special term. The general term on appeal

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reversed the order denying the motion and discharged the defendant from imprisonment. It is from the order of the general term thus made that this appeal is taken. Was there any such irregularity or defect in the granting of the order under which the defendant was arrested, and imprisoned as to require that it be set aside? By the first section of title thirteen, chapter eight, part three, of the Revised Statutes, entitled "of proceedings as for contempt to enforce civil remedies and to protect the rights of parties in civil actions," (2 R. S. 534, 1st ed.), provision is made that every court of record shall have power to punish by fine and imprisonment, or either, parties to suits and others *for any disobedience to any lawful order, decree or process of such court, whereby the rights or remedies of a party in a cause or matter depending in such court may be defeated, impaired, impeded or prejudiced.* And by section 285 of the Code it is provided, that when a judgment requires the performance of any other act than the payment of money, a certified copy of the judgment may be served upon the party against whom it is given, or the person or officer who is required thereby, or by law, to obey the same, and his obedience thereto enforced. If he refuse, he may be punished by the court as for a contempt. It is plain, then, that the defendant, upon refusing to obey the judgment, was guilty of his misconduct, which made him liable to be proceeded against as for a contempt. Two methods of proceeding against a party for such misconduct are provided for by section five of the statute in relation to contempt, above referred to, which are as follows: The court shall either grant an order on the accused party to show cause, at some reasonable time therein specified, why he should not be punished for the alleged misconduct, or shall issue an attachment to arrest such party, and to bring him before such court to answer for such misconduct. If the proceeding by attachment is adopted, the party accused is to be arrested and personally before the court, unless he gives a bond with sureties to appear on the return

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of the attachment, and abide the order and judgment of the court thereupon (§ 12), and when he is brought into court upon the attachment, the court must cause interrogations to be filed, specifying the facts and circumstances alleged against him, and requiring his answer thereto (§ 19). Under this mode of proceeding no order for punishment for the misconduct by fine or imprisonment, can be made unless the party accused shall have been brought personally into court upon the attachment, or shall have voluntarily appeared therein; but in default of his being so brought in or so appearing, the court either awards another attachment or orders the bonds taken on his arrest prosecuted. If the other mode of proceeding is adopted, there is no specific direction in the statutes in regard to the manner in which the order to show cause shall be served, or as to the course of proceeding after service, except that section three provides, that when the misconduct is not committed in the immediate view or presence of the court, the court shall be satisfied by due proof, by affidavit of the facts charged, and shall cause a copy of such affidavits to be served on the party accused, a reasonable time to enable him to make his defense. The mode of proceeding adopted in the case at bar, was by the order to show cause with the affidavits upon which it was granted, was necessary. The learned judge who gave the opinion of the general term in the court below, held that personal service in such cases is indispensable, basing his opinion on the well settled principle of the common law, that no person shall be condemned unheard. If we keep in mind the distinction between proceeding to punish criminal contempts and proceedings as for contempts to enforce civil remedies, we shall see the reason why personal notification of the accusation, is under the principle invoked by the learned judge, indispensable in the one case while it may not be in the other. Where the proceeding is to enforce a civil remedy, the party in default has already had the opportunity of contesting his liability to perform what the proceed-

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ing seeks to compel him to perform, and such proceeding is in effect, but an execution of the judgment or order against him. There is in the return of the proceedings, as carried out in this case, no more reason for determining it as an infraction of the principle, that no person shall be condemned unheard, than in every case where an execution may issue upon a judgment against the person of the defendant. Judgment in an action for tort, for example, is obtained against a defendant, whereby he is condemned to pay the plaintiff a specific sum of money. In order to compel him to pay the money, he is liable to arrest and imprisonment, and this without any opportunity to show cause against it. It is the consequence of his non-payment of the money which, after personal notice and the opportunity to contest the claim he has been adjudged therefor, he therefore is not condemned unheard. The execution against his person is in pursuance of the judgment which has been rendered against him by the court, after personal notice of the claim and full opportunity to be heard against it. In reference to the right to be heard, the defendant in the case at bar, occupies a similar position. His obligation specifically to perform the contract in question in the action, has been established by the judgment in regard to which he has been heard, and this proceeding is merely to enforce his fulfillment of that obligation. He can no more impugn the proceeding upon the ground of its contravention of the great principle alluded to, than if he were defendant in an execution against his person in an action of tort.

As has already been observed, the statute under which this proceeding was instituted does not specify in what way the order to show cause, with the affidavits on which it was founded, shall be served upon the party accused. When the proceeding is instituted by one party to an action against another, to enforce the performance of an order or decree, it is to be deemed, I think, a proceeding in the action, and all the papers are entitled in the action. (*Stafford agt. Brown,*

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4 Paige, 360; *Brown* agt. *Andrews*, 1 *Barb. S. C. R.* 227.) Hence it was, doubtless, that the chancellor, in *Albany City Bank* agt. *Schermerhorn* (9 *Paige*, 372), said, "Where the party proceeds by an order to show cause, copies of the order and of the affidavits, and other papers on which it is founded, must be served on the accused or his solicitor," &c. In *Watson* agt. *Fitzsimmons* (5 *Duer*, 629), the plaintiff obtained an order to show cause why the defendant should not be punished for his misconduct in refusing to deliver his property to a receiver, upon the return of the order. The defendant appeared and denied the alleged contempt, and the court made a further order referring it to a referee to take testimony and report whether the defendant was guilty of a contempt. The referee reported the defendant guilty, and upon this report, and all the prior proceedings, the plaintiff moved the court for an order adjudging the defendant guilty of the contempt. On the part of the defendant, it was insisted that the court had no power to make the order of reference. The court, however, said, "This proceeding is one had in the action in which the judgment was recovered, and section 271, sub. 3 (of the Code), authorizes a reference in such a case;" and after advertting to the two modes of procedure by order to show cause and by attachment, the court further said, the statute is silent where the first mode named is adopted, as to the course to be thereafter pursued, whether the defendant appears or fails to appear. It may, therefore, be such as conforms to the general practice of the court upon any order to show cause why relief should not be granted. The proceeding was held regular, and the decision was affirmed by the general term, and, as appears by a statement in 10 *Bosw. R.* 697, was subsequently affirmed by the court. In the case at bar, it is correct, I think, to say that the proceeding was one taken in the action. The judgment remained unexecuted, and the court was proceeding in the mode prescribed by the statutes to execute its judgment. The order to show cause, provided for by the statute, in the observance of any statu-

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tory provision to the contrary, was then governed by the practice of the court in regard to order to show cause, both in respect to its service and the further proceedings upon it. That according to such practice, an order to show cause may be served upon the attorney of the defendant, will not be denied. Indeed, that is the mode of service of all papers in the action prescribed by the Code, except the summons or other process, or any paper to bring a party into contempt. (*Code*, §§ 417, 418.) The papers in this case, which brought the party into contempt, were the certified copy of the judgment and summons, and underwriting of the referee, requiring the defendant to appear before him and make the conveyance. These were personally served, and the defendant, by his refusal to comply with them, was brought into contempt. The learned judge who gave the opinion in the court below has referred, in support of his position, that personal service of the order is indispensable to the provision of the statute on the subject of criminal contempts (2 R. S. 278, § 12, 1st ed.), requiring personal service, as follows: "Contempts committed in the immediate view and presence of the court may be punished summarily; in other cases, the party charged shall be notified of the accusation, and have a reasonable time to make his defense." But the succeeding 14th section is as follows: "Nothing contained in the preceding sections shall be construed to extend to any proceeding against parties or officers, as for a contempt, for the purpose of enforcing any civil right or remedy."

The order to show cause is in effect but a notice of motion, and, according to the practice of the court, may ordinarily be served upon the attorney of the adverse party. Although in this case the judgment was entered in May, 1856, and the order to show cause was made and served on the defendant's attorney on the 9th of December, 1857, yet, inasmuch as it appears that the defendant had been avoiding the service of a prior order to show cause, and that, after service of the second order, by the direction of the court, upon the attor-

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ney, and before the granting of the order on which the defendant was arrested and imprisoned, he consulted with his said attorney, and has not denied that the attorney was authorized to appear for him and oppose the granting of the order for his arrest and imprisonment. As he did appear, it must be clear that the attorney is to be regarded as the defendant's attorney when the service was made, and that the service of the order to show cause was, in all respects, sufficient. (*Drury agt. Russell*, 27 *How. Pr. R.* 130.) Another ground stated in the opinion of the court below for the reversal of the order of the special term was that, in the order to show cause, the defendant was required to show cause "why an attachment should not be issued against him, and he be punished for his alleged contempt and misconduct in not having conveyed," &c., while the statute does not authorize an order to show cause why an attachment should not issue, but only why he should not be punished for the alleged misconduct. If the order required of the defendant more than the statute allowed, that would not make it void as to the requirements which the statute does allow. And the suggestion that it might have misled the defendant to suppose that only an attachment would be applied for, and that he would have an opportunity, when brought into court upon the attachment, to answer the accusations made against him upon interrogatories, is one which I think insufficient to justify a reversal of the order of the special term, since there is no pretence by the defendant that he was so misled.

As another ground for its order of reversal, the general term is inclined to the same opinion that even in this case it was necessary to file interrogatories, and that the order of commitment was not warranted until the defendant had been given the opportunity, upon interrogatories, to purge his contempt. The statutes cited, and what has already been said in regard to them, show, I think, that when the proceeding is by an order to show cause, no interrogatories are necessary, and such was the opinion of this court in *Brush*

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agt. Lee (*MS. opinion; case decided June Term, 1863*). A further ground for decision of the general term, put forth in the opinion, is that, inasmuch as the defendant was never personally before the court in this matter, the court had no jurisdiction of his person, and therefore the order for his arrest and imprisonment was unauthorized and void. If the proceeding is to be regarded as one in the action, as I have endeavored to show it is, then, clearly, this ground is not well taken. The court having obtained jurisdiction of the person of the defendant in the action, retains that jurisdiction, for all purposes of enforcing the judgment, until its requirements are fully performed and executed. It is obvious, also, that the excuse for non-performance of the requirements of the judgment could not be regarded by the court as an excuse; for that would be permitting the party to set up as such excuse what he should have set up against the rendering of the judgment. After judgment has passed against him, no matter what would have constituted a defense to the judgment, and if in due time and manner brought before the court, prevented it, can be allowed as reason why it should not be enforced.

I am of the opinion that the order of the general term, reversing the order of the special term, is erroneous, and should be reversed.

All concur.

A motion for re-argument was made and denied.

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COURT OF APPEALS.

THE PEOPLE *ex rel.*, WILLIAM C. WETMORE, and others, respondents, agt. THE BOARD OF SUPERVISORS OF THE COUNTY OF NEW YORK, appellants.

Questions of the *constitutionality* of a law are never considered in this court, unless necessary to the determination of the appeal.

The act of 1855 appointing *commissioners of records* for the city and county of New York, provided, that "the necessary expenses incurred by them shall be paid by the county treasurer, upon the certificate of said commissioners; and the supervisors of said city and county, are hereby authorized to raise, by tax, the amount required to defray the same."

The act of 1860, containing the annual tax bill, provided, that "the said board of supervisors are hereby empowered to cause to be raised and collected in manner aforesaid, the further sum, not exceeding \$80,000, to meet and pay whatever sum up to that amount, as may be found due to the contractors with the commissioners of records of the city and county of New York. The comptroller is authorized to pay said amount when the same shall be judicially determined."

Held, that the board of supervisors, under these acts, was neither charged with the duty, nor clothed with the power of making payment of the moneys thus authorized to be raised. The latter act left it with the courts to determine whether the claimants were entitled to this money; and the comptroller was not authorized to pay it over, until the right of the contractors should be judicially ascertained.

This judicial determination which was to precede the application of the fund by the comptroller, was not a condition precedent to the authority of the board to raise it. The board of supervisors were, therefore, required imperatively to raise this fund, irrespective of the judicial determination, and on their refusal a *mandamus* would lie to compel them to do so.

Argued September Term, 1865; decided October, 1865.

A PEREMPTORY MANDAMUS was allowed on the relation of the commissioners of records of the city and county of New York, requiring the board of supervisors to raise by tax, the sum of \$72,034.26 for the purposes designated in the act of 1860. (*Laws of 1860, p. 1,024.*)

The facts on which the mandamus was granted, were substantially these:

On the 13th of April, 1855, the legislature passed "an act for the appointment of commissioners of records for the city and county of New York," which provides as follows:

"§ 1. William C. Wetmore, Jonathan Nathan, Richard,

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Busteed and George P. Nelson are hereby appointed commissioners of records for the city and county of New York, with full power to examine into the condition of the records, documents, maps and indices in the offices of the clerk, register and surrogate of said city and county, and to have the same copied and printed in such form and to such an extent as they may deem proper, and to do such further acts for the preservation and convenient examination of the same as the public interest may require.

"Said clerk, register and surrogate shall be *ex officio* commissioners in reference to their respective offices.

"§ 2. The said commissioners shall receive no compensation for their services.

"The necessary expenses incurred by them shall be paid by the county treasurer upon the certificate of said commissioners, and the supervisors of said city and county are hereby authorized to raise by tax, the amount required to defray the same." (*Laws of 1855*, p. 763.)

On the 17th of April, 1860, the legislature passed the annual tax bill for the county of New York, the sixth section of which provides as follows:

"§ 6. And the said board of supervisors are hereby empowered to cause to be raised and collected in manner aforesaid, the further sum not exceeding eighty thousand dollars, to meet and pay whatever sum, up to that amount, as may be found due to the contractors with the commissioners of records of the city and county of New York.

"The Comptroller is authorized to pay said amount when the same shall be judicially determined." (*Laws of 1860*, p. 1024.)

It appears that on the 15th of November, 1855, the commissioners of records entered into a contract with McSpedon & Baker to prepare index books, on a new and more perfect plan, of all instruments recorded in the books of the register's office, and to print and bind one thousand sets thereof, at prices fixed in the contract; that the contractors proceeded

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with the execution of the work ; that prior to 1860 they had received under the contract, upon the certificate of the commissioners, from moneys raised by tax by the board of supervisors under legislative authority, the sum of \$192,877.80 ; that all moneys raised for the purpose of defraying the necessary expenses incurred by the commissioners had been exhausted ; that no funds remained in the hands of the county treasurer applicable to that purpose, and that there was due to McSpedon & Baker, under their contract, the further sum of \$58,957.12, which was duly certified by the commissioners in conformity with the act.

It appeared in like manner that there were due to other parties for services performed by the directions of the commissioners, under the authority of said act, various sums certified by them and specified in the moving papers, augmenting the amount required to be raised for the purposes originated in the act of 1860, to the aggregate sum of \$72,034.26.

On the 22d of May, 1860, the commissioners certified in duplicate to the board of supervisors the amounts so incurred, and made the usual requisitions for the raising thereof, by tax.

It was alleged in the moving papers, that down to the 26th of July, 1860, the board of supervisors neglected and refused to raise such amounts or any portion thereof ; that they did not intend to raise the same or to take the necessary steps therefor ; and that they were preparing to issue their warrant for the collection of the taxes of the city and county, without including any levy or appropriation for the purposes above referred to.

On the 9th of August following, an affidavit was made in behalf of the board of supervisors, by the president, in opposition to the application, alleging that the committee to whom the question had been referred had reported against including these amounts in the tax levy ; that on the 17th of July the report was recommitted, in order that there might

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be a new report; that the committee still had the matter under advisement; that the said board had not refused to comply with the requisitions, and that the president did not know the intention of that body, and had no means of information until final action should be had.

The affidavit also alleged that McSpedon and Baker had attempted, the previous year, to compel the board by mandamus to raise money for a like purpose, and that such attempt had thus far failed, though the proceedings were still pending on appeal from an order refusing to quash the return of the board; that such appeal involved the question whether the act of 1855 was constitutional, and that it would be pressed to argument at the next September general term.

The affidavit further alleged that the act of 1855, appointing commissioners of records, was unconstitutional and void. It further alleged that, at the time the expenditures in question were said to have been incurred by the commissioners, there was no appropriation in the county treasury to pay the same, or any part thereof. It also alleged that the board had no means of ascertaining that the expenses in question were incurred or that the same were necessary, other than the certificates of the commissioners of record. It appeared by the affidavit that a meeting of the board had been held on the 7th of August, 1860, and that the board had then adjourned to the 28th of August.

On the hearing at special term, before Judge SUTHERLAND, on the 12th of September, 1860, a peremptory mandamus was granted, and the order was subsequently affirmed on appeal to the general term.

From that decision the board of supervisors took the present appeal.

ABRAHAM R. LAWRENCE, JR., *for appellants.*

JOHN W. EDMONDS, *for respondents.*

By the court, PORTER, J. It is quite evident, from the inac-

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tion and delay of the board of supervisors, as well as from the grounds on which the application for a mandamus was resisted, that the board did not recognize its obligation to raise the moneys in question under the act of 1860. There was, it is true, no formal refusal; but we think the court below was right in holding that, under the circumstances disclosed in the affidavits, the neglect of the board was equivalent to a refusal to comply with the requisition. (*The Queen agt. The Vestrymen of St. Margaret*, 8 *Adolph. & Ellis*, 889, 904; *The People agt. Supervisors of Richmond*, 20 N. Y. 253.)

The question whether the act of 1855 was constitutional is not necessarily involved, and such questions are never considered in this court unless they are essential to the determination of the appeal. (*Frees agt. Ford*, 2 *Seld.* 176.) The authority which the supervisors were called upon to exercise was conferred by a subsequent law, the validity of which is entirely clear. (*Laws of 1860*, p. 1024, § 6; *Thomas agt. Leland*, 24 *Wend.* 65; *Town of Guilford agt. Supervisors of Chenango*, 3 *Kern.* 143; *Brewster agt. City of Syracuse*, 19 N. Y. 116. The board was empowered by the act of 1860 to raise and collect by tax a fund not exceeding \$80,000, and sufficient to pay such amount as might be found due to the contractors with the commissioners of records.

It was neither charged with the duty nor clothed with the power of making payment. The act left it with the courts to determine whether the claimants were entitled to the moneys so raised; and the comptroller was not authorized to pay it over until the right of the contractors should be judicially ascertained.

The record discloses the fact that, at the time of the passage of the act of 1860, a litigation was pending between the contractors and the appellants, in which an issue was made as to the validity of the law appointing the commissioners; and the design of the legislature evidently was to direct the raising of a fund sufficient to meet the demands of the claimants for services rendered by them for the public benefit, and

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on the pledge of the public faith, and the performance of which was certified by the proper officers, in conformity with the provisions of the act of 1855. It is equally plain that the legislature did not intend to direct the payment of the fund from the treasury until the rights of the parties beneficially interested should be fixed by legal adjudication.

It is insisted that the judicial determination which, by the terms of the act, was to precede the application of the fund by the comptroller, was a condition precedent to the authority of the board to raise it. Such a construction would be subversive of the plain purpose of the provision. If the precise amount to be paid was to be fixed by judgment before the action of the supervisors, there would have been no propriety in the limitation of the levy to \$80,000. The law required them to raise, within this limit, so much as should be sufficient to meet the amount found due to the contractors, and this was readily ascertainable by the certificates of the commissioners, which the statutes had made presumptive evidence of the facts. (*Laws of 1855, p. 763, § 3.*) In respect, however, to payments by the comptroller from the fund in question to the contractors, the legislature superadded the further condition that the amounts should be judicially ascertained. The design of the law maker is quite apparent, and though the language in which the intent is expressed is loose and inartificial, we are bound to give full and fair effect to the substance of the provision.

The order of the general term should be affirmed.

All the judges concurring.

Order affirmed.

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NEW YORK COMMON PLEAS.

JULIUS HULSEN and WILLIAM B. TAYLOR agt. AUGUST WALTER, SOLOMON ZECKIEL, J. ZECKIEL and HENRY BYER.

When demand is made by the mortgagee of the amount secured to be paid by a chattel mortgage *payable on demand*, and is refused, the legal title to the mortgaged property becomes absolute in the mortgagee.

After such demand and refusal, the mortgagor cannot charge the property by a second mortgage. Under such circumstances, a subsequent mortgagee would take no interest in the property, and would have no right to redeem by offering to pay the first mortgage.

A mortgagee of chattels, whose title has become absolute, is not bound to foreclose his mortgage. *To extinguish the equity of redemption, he should do so.*

A refiling of a chattel mortgage by the mortgagee, after his legal title to the property has become absolute, is no waiver of the forfeiture as against a subsequent mortgagee, who had taken his mortgage previous to such refiling, with the knowledge of the forfeiture.

Special Term, December, 1867.

MOTION to dissolve an injunction.

On the 5th September, 1864, Henry Byer, one of the defendants, executed a chattel mortgage upon certain property situated at No. 19 Chatham street, New York, to Solomon Zeckiel, another of the defendants, for the sum of \$900, for money loaned. The mortgage was payable on *demand*, and was on the same day filed in the office of the register of the city and county of New York. On the 3d day of January, 1865, the said Byer made another mortgage upon the same chattels, to one Stephen J. Gordon, for the sum of \$2,200, payable in twelve months from the date thereof. This mortgage was filed in the office of the register of New York, on the 29th day of June, 1865. Byer, on the 11th day of May, 1865, executed another mortgage on the same property to Isaac Herman, for the consideration expressed therein, of \$2,500, payable on demand. This mortgage was filed in the register's office on the 10th day of November, 1865.

The mortgage first above-mentioned, from Byer to Zeckiel,
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was due and owing before either of the last two mortgages were executed, and no part of the moneys secured to be paid thereby has been paid, and the amount due thereon had been demanded of the mortgagor by the mortgagee, before the mortgages to Gordon and Herman were executed; and at the time Gordon and Herman took their mortgages, they respectively knew of the existence of the Zeckiel mortgage, and that it was due and owing, and a valid and subsisting lien upon the property. On the 20th day of June, 1866, the said Herman assigned his mortgage to Alexander M. Christaller, and on the 28th of June, 1866, the said Gordon assigned his mortgage to said Christaller.

On the 28th day of June, 1866, Christaller, the assignee, caused the two mortgages, to wit., the Gordon and Herman mortgages, so assigned to him, to be foreclosed; and at the foreclosure sale the said Christaller bought all the property mentioned in the schedules of the said mortgages, and thereafter transferred the said property to the plaintiffs in this action.

On the 5th day of September, 1865, the Zeckiel mortgage, being the mortgage first above mentioned, was renewed in the office of the register of the city and county of New York, where the original was filed; and on the 6th day of July, 1866, the same was assigned to the defendant Walter, for the sum of \$1,017 73-100, by said Zeckiel. On the 7th day of July, 1866, and after the two mortgages above described had been foreclosed, and the property transferred to the plaintiffs by the purchaser at the foreclosure sale, the said Walter caused the said mortgage on said property, so assigned to him, to be duly foreclosed, and the property was sold thereunder, and bid off and purchased by said Walter. Walter has not obtained the possession of the property, the same remaining in the possession of plaintiffs, the transferees thereof from Christaller.

The plaintiffs then brought this action, and in their complaint *ask to redeem the property* from the force and effect of

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the mortgage *first* above mentioned, and from the sale made thereunder, asking for an account of the moneys due thereon, and offering to pay the same. Plaintiffs obtained an order of injunction, enjoining Walter, the purchaser under the mortgage, from interfering with the property or entering into the possession thereof, as purchaser or otherwise.

The action was tried before a referee, who reported, amongst other things, the facts above stated, and reported as conclusions of law, that, under and by virtue of said foreclosure of the first mortgage, the plaintiffs were barred and foreclosed of any interest they had or might have under and by virtue of said Gordon and Herman mortgages, the assignment of same to Christaller, and the foreclosure and sale under same, and the transfer to the plaintiffs by Christaller of the property purchased by him at such sale; that plaintiffs had no right, title or interest whatever in, or any right of possession to, the property; that Solomon Zeckiel, the first mortgagee, was entitled to the possession of the goods mentioned and contained in his said mortgage, before either said Gordon or said Herman mortgages were made; and that the title to said property had become absolute in said Solomon Zeckiel, by reason of the default of the defendant Byer to pay, according to the terms of said mortgage, after demand; that the plaintiffs are not entitled to redeem, nor to the relief demanded in the complaint.

The defendant Walter now moves, upon the coming in of the referee's report, for an order dissolving the injunction which restrained him from taking possession of the property.

The plaintiffs resist the motion, upon the grounds, among other things, that they are about to appeal from the judgment to be entered on the referee's report to the general term.

CHARLES F. WETMORE, *for the motion.*

A. BLUMENSTIEL and AARON J. VANDERPOEL, *opposed.*

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VAN VORST, J. A mortgagee of chattels has the legal title to the property covered by the mortgage, liable to be defeated by redemption. The title of the mortgagee becomes absolute on the failure of the mortgagor to discharge the conditions of the mortgage. (*Burdick* agt. *McVanner*, 2 *Denio*, 170; *Fuller* agt. *Acker*, 1 *Hill*, 475; *Dane* agt. *Mallory*, 16 *Barb.* 49, 50.)

After the condition is forfeited, all the cases agree that the interest of the mortgagee in the chattel can be levied on and sold as his property. If taken out of the mortgagee's possession, he can maintain successfully a suit for its re-delivery to him as his absolute property. After such forfeiture, the only right which remains in the mortgagor is an *equitable* right of redemption. All legal claim of the mortgagor is gone after forfeiture. He could not sue for the property, nor sell it, or give another valid mortgage upon it. A person can neither sell or mortgage—and a chattel mortgage is a sale—a thing to which he has no title. Nor, after forfeiture, is the mortgagee bound, at law, to receive the amount of the mortgage debt, and restore the property to the mortgagor. The party has left to him only his equitable remedy by bill to redeem. (*Charter* agt. *Stevens*, 3 *Denio*, 33.)

The mortgage from the defendant Byer to Zeckiel, and which was subsequently assigned to Walter, was *payable on demand*. The mortgagee did not reduce the property into his actual possession, but he did *demand payment*, which was refused. After that the legal title became absolute in the mortgagee. He had a perfect right to take the property at once into his possession, and sell and dispose of it as his own, and he could not be interfered with in that right by the mortgagor himself, nor by any person claiming under him. The property was not subject to be charged by any subsequent sale, mortgage or incumbrance which the mortgagor might seek to make of or impose upon it.

The referee has reported as facts in this case, that the mortgage from Byer to Zeckiel was due and owing before

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either of the last two mortgages were executed, and that no part of the moneys secured thereby had been paid, and that the amount due thereon had been demanded of the mortgagor, by the mortgagee, before the mortgages to Gordon and Herman were executed; and that when Gordon and Herman took their mortgages they respectively knew of the existence of the Zeckiel mortgage, and that it *was due and owing*. Under such a state of facts, the mortgages to Gordon and Herman conveyed no title in the property to them. Byer, at the time he executed these mortgages, had no legal title to convey, and could transfer no interest in the property to them. Christaller was the assignee of the Gordon and Herman mortgages; as such assignee, he could take no greater right or interest than his assignors had. If the mortgages were not a valid lien when they were made, they could not ripen into a good security in his hands.

The proceedings on the part of Christaller to foreclose the mortgages, and the purchase made by him on the sales under said mortgages gave him no title, and he could not convey any to the plaintiffs, and the plaintiffs claiming through Christaller under the facts reported by the referee, have no right in equity to redeem. Besides the equity of redemption remaining in Byer, the mortgagor, was completely cut off by the foreclosure of the first mortgage by Walter, the assignee. Walter was not obliged to foreclose to perfect his legal title to the property; under the forfeiture he was already the absolute owner. But the proceeding had the effect to extinguish the outstanding equity of redemption. It was claimed by the counsel for the plaintiffs, on the argument of the motion, that the subsequent re-filing of the mortgage by Zeckiel the mortgagee, and his assignment of same to Walter, was a waiver of the forfeiture created by the demand and refusal to pay the mortgage, and inconsistent with the claim of absolute ownership in the chattels. I have given this point much consideration with a view to see if it could give the plaintiffs relief. But I do not see how it can aid them.

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I do not think that they are in a position, with regard to the subject matter, under the facts of this case, to claim relief from these acts. A person ignorant that a forfeiture had occurred and who had acted upon such re-filing as an acknowledgment on the part of the mortgagee, that his title had not become absolute, might make a claim on that ground. But it appears, as has heretofore been stated, that the mortgages under which plaintiffs claim were executed long anterior to such re-filing, and that the mortgagees had knowledge of the facts which created the forfeiture at the time they took their mortgages, and in law must be presumed to have known that Byer had then no interest or title in the property to convey to them.

Motion to dissolve injunction granted.

SUPREME COURT.

**MAURICE LANERGAN, plaintiff in error, agt. THE PEOPLE,
defendants in error.**

The court of general sessions of the city and county of New York, have the power to grant new trials upon the merits and on the ground of newly discovered evidence. The act of 1859 (*Laws of 1859, ch. 339, § 4*), which grants to the courts of "sessions of the several counties of the state, the power to grant new trials, extends to the court of general sessions in the city and county of New York. A prosecuting officer cannot be compelled to elect upon which count, in an indictment for homicide, he will ask a conviction, the indictment containing several counts, alleging a killing in three different ways. A general verdict of guilty is not repugnant, inconsistent or void.

Construction of the act of April 12, 1862, as to what constitutes the difference between the two degrees of murder.

Premeditation proves a malicious intention when applied to a homicide, and when the killing occurs with an intent to effect death, however instantaneously, the intent is formed prior to the commission of the deed.

The legislature intended the application of the term "premeditated" to an intent formed on the instant of killing.

Intoxication must result in a fixed mental disease of some continuance or duration, before it will have the effect to relieve from the responsibility for crime.

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First District, General Term, December, 1867.

Before LEONARD, P. J.; SUTHERLAND and CLERKE, Justices.

WRIT OF ERROR. The plaintiff in error, Maurice Lanergan, was indicted in the court of general sessions of the city of New York, for the murder of his wife, on the 26th of March, 1866. At the June term of the court, 1866, before the Hon. JOHN K. HACKETT, recorder, the plaintiff in error was brought to trial upon the indictment, and was convicted of murder in the first degree, and sentenced to be executed upon the 9th day of August, following. A writ of error and stay of execution was allowed. The facts and points will fully appear in the opinion of the court.

WILLIAM F. KINTZING, for plaintiff in error.

The prisoner was indicted for murder, and tried in the court of general sessions of the peace, in and for the city and county of New York, on the 13th, 14th and 17th days of June, in the year 1866, was convicted and sentenced to death; proceedings were stayed in consequence of the allowance of a writ of error and stay of execution by this honorable court.

I. The court erred in refusing to charge, as requested, upon following propositions of law:

1st. "That in order to constitute murder in the first degree, the premeditation must have existed prior to the immediate occurrence which resulted in death."

2d. That, if upon a sudden quarrel or meeting between parties, one kills another designedly and with malice, there being no previous deliberation, it is the duty of the jury to treat such as a case of murder in the second degree.

Counsel for the prisoner requested the recorder to charge the jury in the affirmative upon the above mentioned propositions of law, in order to put a construction on the act of April 12, 1862, as to what constituted murder in the second degree, the above being the true and proper distinction between murder in the first and second degree, as contended upon the trial of this cause.

The act of April 14th, 1860 (*Sess. Laws*, p. 712), since repealed, enacted, "all murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration of, or the attempt to perpetrate any arson, rape, robbery or burglary, or in any attempt to escape from imprisonment, shall be deemed murder of the first degree, and all other kinds of murder shall be deemed murder of the second degree." * * * *

§ 3. "Upon any indictment against any person for murder in the first degree, it shall and may be lawful for the jury to find such accused person guilty of murder in the second degree." Murder in the first degree, only was punishable with death. The act of 1860, was repealed by the act of April 12, 1862 (*Sess. Laws*, p. 368). The act of 1862, section 5, provided, "such killing, unless it be manslaughter, or excusa-

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homicide, as hereafter provided, shall be murder in the first degree in the following cases :

First. When perpetrated from a premeditated design to effect the death of the person killed, or of any human being.

Second. When perpetrated by an act eminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual.

Third. When perpetrated in committing the crime of arson in the first degree. Such killing, unless it be murder in the first degree, or manslaughter, or excusable, or justifiable homicide, as hereinafter provided, or when perpetrated without any design to effect death, by a person engaged in the commission of any felony, shall be murder in the second degree. (*Edmond's Rev. Stat.*, vol. 2, p. 677.)

The act of 1862, differs from the act of 1860, in its definition of murder in the first degree, in one essential particular. The act of 1862 using the following words : "When perpetrated from a premeditated design to effect the death of the person killed, or of any human being," instead of "wilful, deliberate, and premeditated killing," as contained in the act of 1860. "Premeditated" is one of the strongest words in our language, and it would appear, in consequence of the use of this word, as if the revisers required as an element of the capital crime, a quantum or continuance of deliberation or premeditation, greater than the simple formation of an intent to kill, formed at the instant of striking the blow, which results in death.

In the case of the *People agt. Weiler*, tried before Recorder HOFFMAN, at the February term of the court of general sessions, 1862, in giving a construction to the act of 1860, said in his charge to the jury :

"This indictment is for murder. The statute of this state declares, that the killing of any person with a premeditated design to effect the death of the person killed, is murder in the first degree. It specifies certain other instances in which killing is murder in the first degree, and then says, all other murder is murder in the second degree. The fair and liberal interpretation of this statute, an interpretation which the judges in this district, at any rate, seem to be determined to give it, although it may be open to criticism, is, that in order to constitute murder in the first degree, the premeditation must have existed prior to the immediate occurrence which resulted in the death, as for instance, where one lies in wait to assassinate another, and then afterwards kills, that is a case of premeditation preceding the occurrence which results in death ; or if one, prior to meeting another, forms a design to kill, either an absolute design to kill him, or a design to kill him under certain circumstances, and prepares himself for the killing, if the circumstances should arise, and then carries out his design, that would be murder in the first degree ; but if upon a sudden quarrel or meeting between parties, one kills another designedly and with malice, there being no previous deliberation, the legislature, I think, intended to treat that as a case of murder in the second degree. This is as good an interpretation, and as plain a one, as I am able to give of the law."

There was a conviction of murder in the second degree, and the case was never reviewed. This honorable court is asked to place the same humane and charitable construction on the act of 1862 as was placed by that learned and eminent jurist on the act of 1860, thus making due allowance for the infirmities of our nature.

The leading cases in this state, and which have been and are now relied upon by the courts upon this point, are *People agt. Clark and Sullivan* (7 N. Y. R., 3 Seld. pages 385 and 396). It was held that, if the intention precedes the act, although that follows instantly, it constitutes murder in the first degree. At the time of the decision, murder was not divided, as it is now, into degrees, and might now perhaps be regarded quite inapplicable. At common law, if the design to kill were formed at

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the instant of striking the blow, it would be murder. It would be "malice afore-thought;" but certainly, under the Revised Statutes, it would not be a "premeditated killing." (*People agt. Clark*, 7 N. Y. R. p. 385; *State agt. Turner*, *Wright's R.* 20; *Clark agt. State*, 8 *Humph.* 671; *People agt. Sullivan*, 1 *Parker Cr. R.* p. 347.)

It is but due to this honorable court to state that, since the trial of this case at bar, this court has held, in the case of *People agt. Skeheen*, June general term, 1867, opinion by LEONARD, P. J., in giving a construction to the act of 1862, that murder in the second degree was the killing while in the commission of any felony other than arson in the first degree, and the decision stands unreversed.

II. The court erred in refusing to compel the district attorney to elect upon which count in the indictment he would claim a conviction, and in not compelling the jury to specify upon which count they convicted the prisoner. There were three counts in the indictment; the second count charged the killing with an axe, the first by the use of a knife, and the third by beating and choking.

After the testimony closed, both on the part of the prosecution and the defense, and before the case went to the jury, counsel made the application to the court, on the ground that the killing was of a different nature and character in each count. The court refused to compel the district attorney to elect, allowing the whole indictment to go to the jury.

A verdict of guilty, as in the case at bar, on an indictment containing three counts, each count specifying a different kind of killing, without the prosecuting officer electing upon which count in the indictment he claims a conviction, and the jury particularly specifying upon which count they convict the defendant upon, is repugnant, inconsistent and void, and should be set aside. The verdict, as recorded, finds the prisoner guilty on the three counts, that Lanergan killed his wife three times in one day, a physical impossibility. A beating and choking to death is quite a different death from a killing with a knife or an axe. The evidence must have shown the cause of death either by a knife or an axe, or beating and choking, in order to have supported the indictment at all. (*State agt. Donnelz*, 2 *Dutcher N. J.* 463; *Wharton Am. Cr. Law*, 2d vol. 5th rev. ed. p. 3047, note and authorities; *Wharton Am. Cr. Law*, 1st vol. 5th rev. ed. p. 426; *State agt. Fox*, 1 *Dutcher N. J.* 566; *Archibald's Cr. Pleading*, 1st vol. 7th ed. p. 883 to 866; 2 *Hales' P. C.* 185, 186; 2 *Hawkins' P. C.* ch. 23, § 84; 1 *East's P. C.* ch. 5, § 107, p. 341; *State agt. Abraham*, 6 *Iowa (Clark)*, 117.)

The case of *The People agt. Coll* (3 *Hill's N. Y. R.* 432), cited by the district attorney, is quite inapplicable, the point being different entirely.

III. The court erred in refusing to charge in the affirmative upon the following proposition of law:

"That the fact of the intoxication of the prisoner, if proved to the satisfaction of the jury, is a proper matter to be considered by the jury in determining the question as to whether his mind was in such a condition as to be able to form an intent to kill or a premeditated design to effect death."

The evidence shows that, at the time of the alleged killing, the prisoner was drunk, intoxicated to such an extent as to be quite powerless. The prisoner, to use the language of the witness Cram, in answer to a question, "I am satisfied in my own mind that he did not know anything" (that is the whole amount of it), "from his actions." The whole evidence, as developed upon the trial, tended to show that the prisoner was in a beastly state of intoxication.

Where the question of intent or premeditation is concerned, the fact of the intoxication of the prisoner is material in determining whether the mind was in such condition as to be able to conceive an intent to kill, and thus determine the precise degree of guilt. (*Wharton Am. Cr. Law*, 1 vol. §§ 41, 44; *People agt. Rogers*, 18 *N. Y. R.* p. 26; *People agt. Rogers*, 3 *Park. Or. R.* p. 649; *Swan agt. The State*, 4 *Humph*

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p. 136; Perils agt. The State, 9 Id. 670; Hause agt. The State, 9 Id. 154; Pennsylvania agt. McTall, Addis. 957; United States agt. Bordenbush, 1 Baldw. 514.)

IV. The court erred in admitting the declarations of the wife in evidence while the prisoner was both drunk and asleep in the chair, although made in his presence.

The witness Cram said that the wife of the prisoner said in his presence, "Do you think he will kill me?" I said, "No; what humbug." At the time of this declaration Lanergan was drunk and asleep in the chair. What is said in the presence of another, while he is in the full possession of his senses, is admissible, for the reason that he has an opportunity to deny it, but not as in the case at bar, when he was deprived of his reason. The silence of the prisoner after the question of the wife was taken most strongly against him, and the admission of this piece of testimony greatly prejudiced his case. The prisoner occupied the same position as if he was deaf or dumb, so far as concerned the admission of that piece of testimony.

V. The court erred in refusing to entertain a motion for a new trial.

After the rendition of the verdict, and before sentence, counsel for the prisoner moved for a new trial. The recorder refused to entertain such motion; on the ground that the court of general sessions had no such power. Counsel cited the following act in support of the application, which the recorder held inapplicable to the court:

"The courts of sessions of the several counties in this state shall have the power to grant new trials upon the merits, or for irregularity, or on the ground of newly discovered evidence, in all cases tried before them." (*Session Laws of 1859*, p. 794, ch. 339, § 4.)

This act is broad and comprehensive enough to include under the word "sessions" the court of general sessions of the peace in and for the city and county of New York. It has been so held by the court of appeals, and the court erred in refusing to entertain the motion. (*People agt. Powell*, 14 Abb. 91; *People agt. Lowenburg*, 27 N. Y. R. 326; *People agt. Ferris*, 35 N. Y. R. 124.)

The court is not asked to reverse the judgment on this ground, but to remit the record to the court of general sessions, with directions that the court hear the motion. This court, exercising appellate, and not original jurisdiction, cannot hear this motion at this time.

VI. The verdict was against the evidence.

VII. The judgment should be reversed, and a new trial awarded to the prisoner.

A. OAKY HALL, *for the people.*

First. The judge could not compel an election upon the counts. To be sure, each charged a different weapon. The inquiry was, did he kill her with any instruments? (*Settled in Colt's case*, 3 Hill, 432.)

The object of these various counts is to prevent a surprise upon the prisoner by evidence.

One count stated an axe, and the evidence was of an axe as the instrument of murder.

The case of Colt is certainly much stronger, for there the count was of an instrument unknown.

Thus one count here was consonant with evidence and good. Judgment upon any one good count is valid. (*Guenther's case*, 24 N. Y. 100.)

Second. The request appearing in first point of prisoner's counsel asked too much. It used the word "prior," to the exclusion of the questions "at the time of," or "during," &c. It also used the word "duty," instead of province. A judge has no right to tell the jury that it is their duty to convict in a certain degree, &c., &c., &c.

Third. The request embodied at point third also asked too much. It used the word

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determining, instead of influencing. Besides, had the latter word been used, the jury could not consider the intoxication of an alleged murderer, except under law of *Rogers* (88 N. Y. 21, 27), *Kenney* (31 N. Y. 344, *end of case*), and many others when before this court, like *Friery*, *Ferris*, &c.

Fourth. The court below held that what took place and was said in presence of prisoner was *admissible* and competent, leaving the jury to judge of its weight and effect.

Was it not a fact for the jury to weigh, whether or no prisoner was deaf or insensible, or able or unable to give or withhold assent? Was the judge to adjudicate that preliminary fact?

The evidence was slight or strong, according to circumstances.

If prisoner was "mazy" or "muddled," then what was done or said did not weigh much; but if he was feigning drunkenness, and heard, then those facts were strong. Besides, the judge duly cautioned the jury on the matter.

Fifth. A motion for a new trial is in discretion. If the court had jurisdiction, then its discretion, exercised negatively, is not reviewable in error.

But, by special statute, the appellate courts have power to grant a new trial upon merits, in criminal cases.

Even if the sessions had jurisdiction of a new trial motion, and erred in refusing to entertain it, or indiscreetly denied it, why ask to remit for argument in that court the motion which this court has just as ample power to hear and decide now?

Sixth. On the grounds that the evidence showed the prisoner possessed with motive to kill, and furnished with opportunity to kill, and was beyond all doubt the malicious killer, the people ask that "substantial justice," under the law of 1855, may be answered by affirming the conviction.

LEONARD, P. J. Maurice Lanergan was indicted, tried and convicted, in the court of general sessions of the city of New York, of murder in the first degree, and sentenced to be executed.

The case comes up before this court on a writ of error.

The indictment charges Lanergan on three counts with killing Delia Lanergan: first, with a knife; second, with an axe; third, by beating and choking. The deceased was the wife of the accused. Both began to use intoxicating liquors excessively on St. Patrick's day, and continued to do so, becoming more and more subjected to intoxication, till the evening of March 26, 1867, when the death of Delia occurred by violence.

They occupied two rooms in a tenement house in Washington street, on the second floor, one of which they let for a lodging room to Tully and Cram, who were witnesses at the trial.

John Sullivan (stated in the charge of the recorder to be a

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lad of thirteen years), testified that he resided in the same house. That towards evening, about two hours and a half after the school which he attended had closed for the day, or about $5\frac{1}{2}$ o'clock P. M., he was going down stairs, and saw Mrs. Lanergan on the floor, near the door of the rooms which the accused, with his wife, occupied, and the accused then beating her with something he had in his hand. He could not see what the accused had in his hand. When Lanergan saw the boy, he "drew the thing back," and put his hand over the mouth of the deceased. Tully, one of the lodgers, came out of the door and went down stairs, passing the witness. Lanergan closed the door. Nothing appears to have been spoken by anyone at this time. He does not mention any noise.

Thomas Carron testified that he occupied a room adjoining that of Lanergan. A little before night, half an hour or so, on the day of the occurrence, he heard three knocks, as it might be of an axe or sledge, in Lanergan's room. In less than an hour he saw Lanergan come out of the room, go down stairs, and out of the house. When Carron left his own room, the door of Lanergan's room was closed. Nothing was said by either of them. Later in the evening he heard Tully in Lanergan's room, hallooing and clapping his hands. He thinks it was about ten o'clock. He went into the room, and saw the deceased lying upon the bed, dead. He heard no scream when he heard the knocks. After this he went at once for the sister of the deceased, Mrs. Hickey, and met Lanergan on the way to his rooms. Lanergan was then returning from Mrs. Hickey's residence, where he had been, and informed her that his wife was dead.

Tully testified that Lanergan and his wife were in bed when he left the house to go to his business, on the morning of the 26th of March. He returned between 6 and $6\frac{1}{2}$ o'clock P. M., and saw Mrs. Lanergan then in bed. Lanergan told the witness he had better get his supper. He left the house, not his supper, and appears to have met Lanergan at about

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8 o'clock, when the two, together with John Hickey, the brother-in-law of Lanergan, took a drink at a public house. They played dominoes at another public house, near by, till after ten o'clock. Tully then went to his room at Lanergan's house, having a night key, with which Lanergan had supplied him. He thought Lanergan under the influence of liquor when he left him. Tully went to the rooms, went in, lit a light, saw Mrs. Lanergan in bed; called, but got no answer; went over and listened to hear her breathe; laid his hand on her chest and found it cold. He then gave the alarm, and called the neighbors.

The week previous Tully saw Lanergan strike the deceased (who was under the influence of liquor, and in bed), with a broom handle upon her hip, to keep her quiet. She was striving to get up, and made a racket, and Lanergan struck her to keep her quiet.

Tully testified that he left the house at $7\frac{1}{2}$ that morning, and did not return until $6\frac{1}{2}$ P. M. Was not at the room at $5\frac{1}{2}$ P. M. Did not see Lanergan beat his wife while she was on the floor. He knows the boy Sullivan by sight. Did not pass him at the time of such an occurrence as the lad testified to.

Cram, who occupied the room with Tully as a lodger, testified that he took Lanergan home about one o'clock on the day of the occurrence, from the residence of Hickey, where they had dinner; that Lanergan was very drunk, and staggered against his wife when he went in, grabbed her, and "went to strike her;" but Cram calling to him not to strike her, for God's sake, and the deceased repeating the words, he staggered into the rocking chair. From his actions, Cram was satisfied that Lanergan was so drunk that he did not know anything. Cram then advised her to lie down. She inquired of Cram if he thought Lanergan would kill her. He replied, "No; what humbug!" Cram says that Lanergan was then asleep in the rocking chair.

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The prisoner's counsel objected to this evidence. The court overruled the objection, and an exception was taken.

The witness then further testified: "I told her it was "humbug, or something to that effect; Mrs. Lanergan asked "me not to go out, but to put him to bed; I went and asked "him, said I, Maurice, get into bed; I then assisted him to "get into the bed; I then left the house."

Lanergan took his dinner that day at Hickey's, and was then quite intoxicated. Referring to the drunken condition of his wife, he said with an oath, while at Hickey's, that he would kill her. Hickey did not think that he meant any harm by this threat. Mrs. Hickey said, "Lanergan, you know you have a good wife." Lanergan cried, and praised the goodness of the deceased.

On an examination of the room occupied by Lanergan, made the next morning, an axe was found there with blood.

The post-mortem examination showed a contusion upon the side of the head, made with some blunt instrument. The dura-mater, or membranous covering of the brain, was ruptured, immediately under the contusion, but the skull was not fractured. There was also a broken broom handle in the room. A knife was taken from the pocket of the prisoner at the station house, and the policeman who made the arrest, and was examined as a witness, testified that he thought the blade appeared to have been recently rubbed.

It should be further observed that the post-mortem examination disclosed only a local extravasation of blood at the place where the skull and dura-mater were bruised; but there was nothing otherwise in a healthy condition.

The face, arms and legs of the deceased appeared to be black and blue, and exhibited signs of bruising.

The witness also speaks of her face as swollen and discolored before the fatal occurrence took place. It is also proven that she had fallen down a flight of stairs. Several witnesses testified to the general good character of Lanergan, as a quiet,

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peaceable and inoffensive person, not quarrelsome, but very peaceable in his disposition.

After the evidence was closed, the prisoner's counsel requested the recorder to charge the jury:

"That in order to constitute murder in the first degree, "the premeditation must have existed prior to the immediate "occurrence which resulted in death;" also, "that if, upon a "sudden quarrel or meeting between both parties, one kills "another designedly and with malice, there being no previ- "ous deliberation, it is the duty of the jury to treat such as "a case of murder in the second degree."

Also, "that the fact of the intoxication of the prisoner, if "proved to the satisfaction of the jury, is a proper matter to "be considered by the jury in determining the question as to "whether his mind was in such a condition as to be able "to form an intent to kill, or a premeditated design to effect "death."

There were other requests made to charge as to the law, but no question has been raised here in respect to any other.

The recorder refused to compel the district attorney to elect upon which of the three counts in the indictment he would claim a conviction, and to this refusal there was an exception.

The prisoner's counsel moved for a new trial, on the ground that the verdict was against the law and the evidence. Argument was then had by the prisoner's counsel and the district attorney, as to the power of the court to entertain the motion. The recorder said, that, assuming that he had the power to hear the motion (but not passing upon that question), no argument would induce him to grant a new trial, either upon errors of law or of fact, and thereupon denied the motion.

Upon being further requested to decide whether the prisoner had the right to move for a new trial in that court; upon the merits, the recorder further said, "I decide this court has not that power." The counsel for the prisoner then said,

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"We except to your honor's refusal to entertain the motion for a new trial."

The prisoner's counsel also insists before this court, upon the present appeal, that the verdict is against the evidence. The recorder did not, in his charge, declare the law in conformity with the requests above stated, made by the counsel for the prisoner.

Previously to the act of 1860, the law was well settled that an intent to kill, formed on the instant of the killing, was proof of premeditation, and established the malicious intent necessary to constitute the crime of murder.

The use of numerous adjectives in the act of 1860, defining murder in the first degree as "willful; deliberate and premeditated" killing, and the enactment of a second degree of murder not punishable by death, induced the judges of the first district, or some of them at least, to hold that an intent to kill, formed at the instant of killing, was not such premeditation as the new statute contemplated. This construction was further confirmed by the immediate conjunction of the adjectives cited above, with a reference to specific acts of murder in the first degree, by poison and lying in wait, involving a premeditation of some considerable time, and embodying the idea of a preconceived plan. Certain other acts of killing, while in the commission of specific crimes, were also declared to be murder in the first degree, without any reference to malice or premeditation. It is not necessary now to decide whether the construction given to the act of 1860 was correct or not. The act of 1862, while retaining the division of two degrees in the crime of murder, has provided three very distinct definitions of murder in the first degree. The first declares that the killing of a human being with a premeditated design to effect death shall be murder in the first degree. This definition is the same as the first definition of the crime in the statutes prior to 1860. The application of the term "*premeditated*" to an intent formed on the instant of the killing, so well established by the courts as

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proof of a malicious intent to commit murder, must be deemed to have been understood by the legislature, and that it was intended that there should be no change in the meaning or application of that term, as applied to the killing of a human being.

Premeditation proves a malicious intention when applied to a homicide; and when the killing occurs with an intent to effect death, however instantaneously the intent is formed prior to the commission of the deed, the crime is murder. Under the law, as it existed prior to 1860, the penalty of that crime was death. Since the act of 1862, such killing is murder in the first degree, and the penalty is the same. The word "premeditated" is used in the same connection in the old and in the present statute, and must have the same meaning and construction.

The definition of murder in the second degree is exceedingly obscure, under the act of 1862. A slight verbal alteration will make it definite and certain, and not unreasonable, or perhaps it is better to say, not without reason. As it reads literally, there is no affirmative definition of murder in the second degree. The second degree is such murder as is not within the definition of murder in the first degree.

The last sentence of section 5, defining the crime of murder, as contained in the act of 1862, reads as follows: "Such killing, unless it be murder in the first degree, or manslaughter, or excusable or justifiable homicide, as herein-after provided, or when perpetrated without any design to effect death, by a person engaged in the commission of any felony, shall be murder in the second degree."

The inquiry occurs, why, except from the definition of murder in the second degree, the killing of a human being by a person engaged in the commission of a felony, although perpetrated without any design to effect death? Such killing was formerly murder, and the penalty death, when no division of the crime of murder into first and second degrees existed. Under the statute, as it existed prior to 1860, such

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killing was embraced in the third definition of murder in express language. The first and second definitions of murder in the first degree, as contained in the act of 1862, are the same, *verbatim*, as contained in the definition of murder by the statute, before the division of that crime into two degrees. The third definition of murder in the first degree, by the act of 1862, includes killing only when perpetrated in committing arson in the first degree. The third definition of murder by the statute in force prior to 1860 was in these words: "When perpetrated without any design to effect "death, by a person engaged in the commission of any "felony." The third definition of murder is the only part of the former law that has been modified. In other respects, the three definitions of murder in the *first degree* are the same now as those of *murder*, contained in the statute before 1860. A further reference to the statutes is in vain to find what crime is committed by the killing of a human being, "when "perpetrated without any design to effect death, by a person "engaged in the commission of any felony." As the statute now reads, such killing is not murder in the first degree, and it is excepted from the definition of murder in the second degree, nor is it found in any other portion of the statutes punishable as a crime. Clearly, it could not have been the intention of the legislature to exempt such a class of crime from any punishment. I will not undertake to declare in this case that the statute, as now existing, can be amended by any judicial construction. It is not necessary so to do. I will barely suggest that an obliteration of the last "or," occurring in the sentence of section 5 in the act of 1862, defining murder in the second degree, will remove the obscurity now existing, and give an express affirmative definition to murder in the second degree, in harmony with the modification of the third definition of murder, as contained in the statutes prior to 1860, into murder in the second degree, except in the single instance of killing when perpetrated in committing arson in the first degree. It will, per-

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haps, not be too much to say that, in my opinion, such an amendment by judicial construction will be in harmony with the intention of the legislature. It will, I think, be impossible to conceive of any definition of murder, as embraced in the law prior to 1860, not now defined to be murder in the first degree, except killing without premeditation or design, by a person in the commission of a felony other than arson in the first degree. The conclusion is entirely satisfactory to my mind, that it was intended to embrace killing, under the circumstances last mentioned, within the definition of murder in the second degree by the act of 1862. Unless this class of homicide be included, there is no crime embraced in the present definition of murder in the second degree.

I expressed the same opinion substantially in the case of *The People agt. Skeehan*, recently decided by the general term in this district, without any elaboration or course of reasoning by which I had reached that conclusion. A reference to that opinion by the counsel for the prisoner has induced me to make this explanation. My reasons have now been given, as they ought to have been in the former case, that the conclusion there stated may stand only for so much as it shall prove to be judicially worth. No doubt it would be better that the amendment should be made by the legislature, rather than left to the construction of the judiciary.

It is evident, from the previous observations, that the recorder committed no error in declining to charge in conformity with the first two requests of the prisoner's counsel, relating to premeditation and deliberation, as applicable to murder in the first and second degrees. Both requests assume that an intent to kill, formed at the time of the commission of the act, will not be evidence of premeditation. The rule of law is otherwise, and the requests are not consistent with the rule.

The remaining request is in reference to the mental condition of the prisoner, arising from an intoxication, which the recorder was requested to instruct the jury they might

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take into consideration, in determining whether he was able to form an intent to kill, or a premeditated design to effect death.

The evidence established that the prisoner had been drinking intoxicating liquors for some days, and that he was very much intoxicated at one o'clock, some four or five hours before the probable time when the killing occurred. Carson, one of the witnesses, saw him go out of the house, leaving his wife there dead, from violence which he had inflicted, and he required no assistance to walk; neither doing anything to call for a remark, so far as it appears from the evidence, nor making any observation, but knowing sufficient to conceal his crime for several hours, and until her death was discovered and the alarm given, at or about ten o'clock in the evening. After passing the evening at different public houses, from the time he left his own rooms after the murder (between six and seven o'clock), until ten o'clock, when he went to the residence of the sister of his deceased wife, and informed her that his wife was dead. He then returned to his own rooms, and neither did or said anything tending to show any want of his usual intelligence or understanding, so far as appears from the evidence. There are few instances of persons who have, in a state of intoxication, taken the life of another, who could refrain from saying or doing something which would tend to inculpation, for nearly four hours after the commission of the act.

There is no evidence tending to establish the existence of any mental disorder or aberration at the time of the offense committed. There was no evidence to show that the will of the prisoner was not entirely the regulator of his conduct.

The rule appears to be that drunkenness is no excuse for crime, and that the person who is voluntarily in that condition must take the consequences of his own acts. (*People agt. Rogers*, 18 N. Y. 9.)

It appears, too, from the same case, that intoxication may be adverted to where "you would not infer a malicious

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"intent," or where the accused has been aggravated by the conduct of the deceased, but not where the killing was caused by the use of a dangerous instrument.

The evidence of intoxication is admissible in every trial for murder, because it may tend to cast light upon the acts, observations or circumstances attending the killing.

Intoxication must result in a fixed mental disease of some continuance or duration, before it will have the effect to relieve from responsibility for crime.

There was no error in refusing to charge as requested upon the subject of intoxication ; nor was there any error in refusing to require the public prosecution to elect between the three counts in the indictment. The prisoner was apprised of the charge, and that proof would be produced to show that the crime was committed in one of the several ways in which it was charged.

The conviction is for murder in the first degree, the crime charged in each count, and not of the facts which constituted the offense.

In Colt's case, the indictment charged the killing with an instrument unknown, in one count, and in another with a hatchet. The indictment was sustained upon appeal, and also the admission of evidence tending to show that the killing was committed by a ball from a pistol, a weapon not mentioned in the indictment, and the evidence was admissible only under the general count, of killing with an unknown instrument.

In the present case, there was evidence tending to prove that the offense was committed with an axe.

The prisoner also had a pocket knife, which the policeman thought had been recently rubbed, leaving a possible inference that an attempt had been made to remove the stain of blood.

The evidence, or rather the probability, of the commission of the offense with the knife, was very slight.

From the evidence of the boy Sullivan, there was more

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probability that the offense was committed by beating or choking.

I can perceive no inconsistency in the conviction had under these counts, and no injury to the defense, or the fairness of the trial.

The recorder denied the motion for a new trial upon the merits. He declared that he would not grant a new trial for any error of law or fact appearing in the case, assuming that he had the power to hear the motion. He was afterwards invited to declare whether he had the power to entertain the motion, and he gave his opinion that he had not the power.

I think, upon the authority of *Lowenburg's* case, in the court of appeals, that the recorder was mistaken in his opinion; but if he had granted a new trial, his mistake would have been much greater, it would have been an error.

There was no error in admitting the evidence of the conversation between the witness Cram and the deceased. Lanergan was present, and, although very drunk, it appears that he was not wholly insensible, although Cram says he was satisfied that Lanergan was so drunk he did not know anything; for it appears that he immediately afterwards asked Lanergan to get into bed, and he complied, with the assistance of Cram.

The conversation was wholly immaterial, as affecting the result. It showed that Cram did not believe Lanergan would kill her, while she had so much apprehension as to ask the opinion of Cram about it.

The evidence tends to prove an absence of malice, rather than the contrary.

There was also some reason to doubt the exact truth of the evidence that the prisoner was so drunk, was "so drunk that he did not know anything," and that "he was asleep;" and in that aspect it was admissible, and competent for the jury to pass upon its weight or sufficiency as evidence.

Upon the merits, the judgment is, in my opinion, correct. I am unable to perceive that there is any error of

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law or fact, or that any injustice had been done by the conviction.

There appears to be no evidence showing any motive to induce the commission of the crime.

The evidence of the lad Sullivan proved that Lanergan attempted to conceal the act which he was committing, and suppress any attempt his wife might make with her voice to give an alarm.

It is true that the evidence of the lad was contradicted by Tully, but both were before the jury, and it was their province to decide upon the credibility of the two witnesses.

The prisoner also concealed the killing for several hours. He has never admitted the killing by himself, and claimed that it was an accident, or for any cause excusable, at least there is no evidence of any such admission.

Concealment is well settled, in evidence of malice, of a premeditated design to commit the deed.

If he had not intentionally committed the killing, some human emotion would have induced him to betray his sorrow or his consciousness of his own overwhelming disaster.

The evidence of the sounds heard in the room of Lanergan by Carron; the axe found there with marks of blood on it; the contusion upon the head of the deceased with a blunt instrument; the fact that the deceased and the accused were left together in their rooms at one o'clock by Cram, when she was last seen alive; that he was seen to leave the rooms shortly after the heavy sounds or knocks heard by Carron; that Tully found the door locked when he returned, at about ten o'clock, no one appearing to have been there after Carron saw Lanergan leaving the place; that after passing the evening away from his room, from the time he left there when Carron saw him till about ten o'clock, when, without anyone giving him the information, he was able to go to the residence of Hickey and inform Mrs. Hickey that his wife was dead, he having previously omitted to make any mention of the fact to Tully or to his brother-in-law, Hickey, with

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whom he had passed a considerable portion of the evening; all these facts, aside from the evidence of the lad Sullivan, make a strong case of premeditated murder. Tully saw Mrs. Lanergan in bed, as he thought, at 6 or 6½ o'clock P. M., and Lanergan advised him to get his supper elsewhere. It is probable, from the evidence of Sullivan and Carron, as to the time when the former saw Lanergan striking his wife, and the latter heard knocks as with an axe or sledge, that the murder had been then committed. Tully was mistaken in supposing that she was alive and lying down in her dress. If so, then the skill with which Lanergan induced Tully to go away was sufficient to rebut any idea of stupefaction from intoxication, and to establish premeditation or design in the commission of the killing.

In my opinion the judgment should be affirmed.

SUTHERLAND, J. I concur in the conclusion, but I would suggest that the *presiding* judge is certainly mistaken in his construction of the fifth section of the act of April 12th, 1862. The last "or" in that section should be read "and."

Compare that section with section 4th.

The killing, without premeditated design, in the commission of a felony, is not excepted in the last sentence of the 5th section, but is made murder in the second degree by it.

The whole act, and especially section 5th, is crudely drawn, but I think its meaning is quite plain.



SUPREME COURT.

SAMUEL C. BOWEN, treasurer, &c., respondent agt. THE FIRST NATIONAL BANK OF MEDINA, appellants.

The Code contains no express limitation of the time within which a motion must be made to set aside an attachment. A motion to set aside the attachment for

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irregularity may be made after judgment obtained and execution issued in the action.*

The receiver of a banking association organized under the provisions of the act of congress, may move to set aside an attachment in the action, upon which the property of the bank had been seized.

The national banks formed under the act of congress are *foreign corporations*, and liable to attachment, within the provisions of the Code.

Erie General Term, November, 1867.

Before DAVIS, MARVIN and DANIELS, Justices.

ON the twenty-third day of February, 1867, an action arising on contract was commenced in this court by the plaintiff against the defendants. At that time the defendants were a banking association, organized under the provisions of the act of congress passed June 3, 1864, to provide a national currency, located and carrying on business at the village of Medina, in Orleans county. An attachment was issued in the action, under which the property of the defendants was seized, on the twenty-third of February, 1867. On the ninth day of March following, a receiver was appointed of the property and assets of the defendants, under the provisions of the act of congress.. Judgment was recovered in the action on the eighteenth of the same month, and on the ninth of April, 1867, motion papers were served, upon which a motion was afterwards made to set aside the attach-

* Note.—There have been some different views presented on this question: In the case of *Thompson agt. Culver* (24 How. 286), it was held in accordance with this decision, that a motion to set aside an attachment may be made after judgment in the action; the judgment does not supersede the attachment. In *Schieb agt. Baldwin* (22 How. 278), it was held, that in an action where an attachment is issued, the entry of judgment in the suit supersedes the attachment, which becomes of no force, and the property of the defendant cannot be seized under it. In *Syracuse City Bank agt. Coville* (19 How. 385), it was held, that the judgment in the action confirms the lien of the attachment. In *Spencer agt. Rogers Locomotive Works* (13 Abb. 180), it was held, that after judgment for the plaintiff has been recovered, the lien of the attachment has become consummated, and the right to satisfaction out of the specific property established, though satisfaction is suspended by appeal, in that it becomes then equivalent to an execution actually levied. In *Lawrence agt. Jones* (15 Abb. 110), it was held, that the issuing of an attachment against a debtor, on the ground that he is a non-resident, while he is in fact a resident, is an irregularity merely; and a motion to discharge the attachment does not involve the merits. Unreasonable delay in moving to set aside the attachment for such irregularity, as where judgment had been rendered and execution issued, is a sufficient answer to the motion.—REP.

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ment as irregular. The special term before which that motion was made denied it, and from the order denying it the receiver appealed to this court.

T. R. STRONG, *for appellants.*

SICKLES, GRAVES & CHILDS, *and BESSAC & BULLARD,*
for respondent.

DANIELS, J. The Code of Procedure contains no express limitation of the time within which a motion must be made to set aside an attachment. For many purposes, the attachment continues to be operative after the judgment has been recovered and the execution has been issued. And if those events limited the period within which such a motion should be made, very great injustice might in some cases be successfully accomplished by means of an irregular attachment. As the legislature has imposed no such limit, and none is necessarily presented by the recovery of the judgment and the issuing of the execution, the party affected by the attachment cannot properly be precluded by them from afterwards making the motion. Where the attachment is merely irregular, voidable, but not void, such a proceeding would be found to be indispensable to the maintenance of the rights secured to the party whose property should be seized under it. These attachments are often issued against parties who hear nothing of them, or the proceedings taken under them, for months after the judgment has been recovered and execution has been issued; and if they could not after that move to set them aside, where they were found to be irregular, the law would afford them no redress for the injuries which the attachments had been made the instruments of producing. In the case of *Thompson agt. Culver* (24 *How.* 286), this point was presented and considered, and the court entertained no doubt but that the motion could be properly made.

As the receiver succeeded to all the rights and interests of the bank, no good reason can be given for precluding him

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from making the motion to set aside the attachment. Where the bank itself omitted for any cause to make the motion, denial of the right to make it to the receiver might very seriously embarrass him in the discharge of the duties the law has imposed upon him. A proper and efficient exercise of the powers conferred upon him require that he should be permitted to make the motion.

This brings up the important point in the case, whether the law will permit the property of these banking associations to be seized by attachment, upon the ground that they are foreign corporations. They are clearly not foreign corporations, within the common import of those terms; for they are formed under the laws of the federal government, which are not foreign to the state of New York. Those laws constitute a part of the government of the people of the state, so far as they are constitutionally enacted, as completely as the laws do which are constitutionally enacted by its own legislature; and, within their appropriate sphere, they are paramount to the laws enacted by the authority of the state itself. They are in no sense foreign laws. Neither are the institutions or corporations for which they provide foreign in their character; for they are provided for by an integral portion of the government of the people existing within the state, though forming no part of its state government. It is done by the national authority, existing and exercising its functions within the states; and no question is presented upon the present appeal in any manner drawing the propriety of this legislation in controversy. What is now involved is the construction which shall be placed upon the law providing for the issuing of attachments against foreign corporations, not as those terms are popularly understood, but as they have been used by the legislature. Ordinarily, it is to be presumed that the popular sense of the terms used is the sense in which they were used by the authority enacting the laws: but in this instance there is good reason for believing that such was not the case; for, in describing the bodies that are referred

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to as foreign corporations, the description has not been confined to those which may be found under the laws of some other state or country foreign to this state, but it has been extended beyond that, so as to include within the comprehension of the law all such corporations as may be formed under any other government than that of the state itself, properly so called. This is not a new feature in the legislation of the state; it will be found embodied in the laws contained in the Revised Statutes, which provided for attachments against what were designated as "foreign corporations." Under the statute then enacted, attachments could, by the express language used, be issued against a "corporation created under the laws of any other state, government or country," where the action was for the recovery of any debt or damages arising on a contract made within this state, or a cause of action arising therein. (*2 R. S. Edm. ed.* 479, § 15.) The corporations thus described are referred to in several of the succeeding sections as "such corporation," while in others they are called "foreign corporations;" indicating the legislative sense to be that "foreign corporations," and "corporations formed under the laws of any other state, government or country," included precisely the same subjects of legislation. This appears to have been done, not for the purpose of restricting the process of attachment to such corporations as were strictly foreign in their nature, on account of their having been formed under the laws of another state or country, but for the purpose of designating those corporations which it had previously been provided could be proceeded against in that manner as foreign corporations. It was in substance a legislative declaration that the terms "foreign corporation" were to be understood in the law as including such corporations as were formed under the laws of any other government than that of the state which enacted the law, as well as those formed under the laws of any other state or country. If that was not the sense in which these terms were used, then none whatever can be discovered in

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the law which can be attributed to them, for no intention is indicated of restricting the legal signification of the section first referred to, in any manner whatsoever. It is not to be supposed that the terms, any other government, in this connection, were made use of without any definite purpose ; and they must have been, if the object of the law was to include only such corporations as should be formed under the laws of another state or country. But one object could have been intended by their use, and that was to include all such corporations as were not formed under the laws enacted by the state itself, even though they were not formed under the laws of another state or country. If they are to have any meaning whatever, that must be their import; for in no other way can any effect be given to them. And if that was the intention the legislature designed to express by them in the enactment of the Revised Statutes, they must have the same construction in the Code ; for the provisions of the Code, in this respect, are substantially taken from the pre-existing legislation relating to the same subject. (2 R. S. Edm. ed. 479, §§ 15, 30; *Statutes at Large*, vol. 4, 677.)

By chapter 1, title 13, of the Code, it is provided that actions may be brought in the supreme court, &c., against corporations created by or under the laws of any other state, government or country, by residents of the state, for any cause of action, and by non-residents, when the cause of action shall have arisen, or the subject of the action shall be situated, within the state. And by chapter 4 of title 7, an attachment may be issued when the action is for the recovery of money, and it is brought against a corporation created by or under the laws of any other state, government or country. These terms, it will be seen, are used designedly in all the laws relating to this subject, and, as before observed, they must have been intended to include all corporations formed under the laws of any other government than the one enacting the law, even though that government should not be the government of another state or country, which would plainly

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include the government of the United States. And when the terms "foreign corporation" are afterwards used, as they are in sections 229 to 239, they were intended to include and refer to the corporations comprehended within the general language of section 227, and to be equally extended in their legal import; and, as so understood, they include corporations formed under the laws of the United States, for that is a government other and different from the one speaking through the law under consideration.

As thus construed and understood, the national banks formed under the act of congress are foreign corporations, and liable to attachment, within the provisions of the Code; for, though formed under a law enacted by the government constituting a portion of the government of the people of the state, it is still no part of the state government properly so called, and is entirely distinct and separate from that which enacts the state laws.

If these institutions are not liable to proceedings by attachment, under the provisions of the Code, then in many cases persons living within this state would be provided by its laws with no remedy against them; for, as they are not formed under the laws of any other state or country, suits could not be maintained against them, even where they should be organized and transact their ordinary business in another state, and their property should be found within this state, unless that could be done upon the ground that they were formed under the laws of another government. They are not, where they exist in other states, formed under the laws of such states. Neither are they formed under the laws of any other country, as that term is used in the statute, for that was intended to refer to corporations formed under the laws of foreign countries. The only manner in which they can be sued at all in this state, where they are formed and exist in other states, is under this provision of the law which allows proceedings by attachment to be taken against them as corporations formed under another government different

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and distinguishable from that of this state. And if this provision will, as it clearly must, include all such corporations as may be formed in other states, under the laws of the United States, it certainly will those formed in this state, for they are, equally with the others, formed under the laws of another government, as those terms are made use of in the Code of Procedure.

They are rendered liable to actions in the courts of the state by the act of congress under which they are organized; and no restriction whatever is imposed, requiring such actions to be brought in any particular way, or limiting them to the same proceedings as may, under the laws of the state, be taken against the corporations formed under those laws (*13 U. S. Stat. at Large*, 116, § 57.), but they are made liable generally to suits, actions and proceedings provided by the state, and they must necessarily be commenced and prosecuted as its laws have designated they may be. In that respect, they are liable to all such proceedings as the laws have provided for rendering the suits that may be commenced against them legally effectual; and as the laws of this state are now formed, that can only be done by holding the national banking institutions liable to proceedings by way of attachment, as corporations formed under the laws of a government distinct and different from that of the state. No difficulty stands in the way of doing this, under the 52d section of the national banking law; for that does not prohibit the seizure of the property and effects of an insolvent banking corporation, by its creditors, when it can lawfully be done by way of attachment proceedings. It merely prohibits the corporation itself from assigning or transferring its property, or paying its debts, after the commission of an act of insolvency, or in contemplation of insolvency, when that shall be done with the intent or design mentioned in the section; and the succeeding section extends the prohibition to the directors, officers, agents and servants of the corporation. (*13 U. S. Stat. at Large*, §§ 52, 53, 115, 116.)

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The order appealed from in this case, as well as in the case of Amos Hutchinson against the same defendant, depending upon a similar state of facts, should therefore be affirmed.

MARVIN and DAVIS, Justices, concur.

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NEW YORK COMMON PLEAS.

THOMAS J. PRENDORILL agt. JOHN A: KENNEDY and JEREMIAH PETTY.

The act organizing the metropolitan police district makes it the duty of the board of police to protect "strangers and emigrants," in the streets of the city of New York. The superintendent of police and the captain of the precinct will not be restrained; by injunction, from placing policemen in front of a public house, in which guests have been *repeatedly* subjected to *unjust, exorbitant and illegal* charges, and from giving warning to "strangers" about to enter "*to be careful.*"

Special Term, December, 1867.

THE plaintiff obtained an order that the defendants show cause why an order of injunction should not issue, restraining the defendant Kennedy, the superintendent of the metropolitan police, and the defendant Petty, the captain in charge of the precinct, from stationing policemen in front of plaintiff's premises, and from giving a warning to *strangers* "*to be careful,*" when about to enter plaintiff's house.

The defendants appeared and showed cause.

F. H. BRYAN, *for motion.*

BROWN, HALL & VANDERPOEL, *opposed.*

VAN VORST, J. The plaintiff in this case keeps a public house on Hubert street, for the entertainment and lodging of travelers. Strangers from distant parts of the country and emigrants are guests of his house. Complaint was made to the police authorities on several occasions of extravagant and exorbitant charges made by the landlord against his guests,

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which were, on the interposition of the police, adjusted. These charges embraced not only excessive items for board at his inn, but unwarranted charges for hack hire in the transportation of persons and their baggage to the plaintiff's house. The defendant Petty, the captain in charge of the precinct in which plaintiff's house is situated, placed his subordinates in front of and near the building, who warned strangers who approached the house as guests, "to be careful." The plaintiff complains that the presence of the police officers in front of his house, and their warning to strangers, is an injury to his business, and he asks for an order of injunction, upon a complaint setting up the alleged grievance, that the defendant Kennedy, the superintendent of the police, and officer Petty, be restrained from thus disturbing his business, and from stationing members of the police in front of his premises. He alleges that the presence of these persons is a "nuisance," and their "warning" to strangers tends to the destruction of his business as the keeper of a public house. By the act organizing the metropolitan police district, it was made the duty of the board of police, among other things, especially "to protect strangers and emigrants" in the streets and at public landings. It is a wise and humane provision which looks to the protection of the "stranger" in our city, and the "emigrant" from distant lands. It is also a good police regulation, as it tends to prevent complaints, disturbances and breaches of the peace. I am of opinion that such protection would sustain a warning "to take care," or "to be careful," to a person, a *stranger*, about to enter a public house in which guests had been repeatedly subjected to extortionate, exorbitant and illegal charges, and of which notice had been brought to the police authorities. The plaintiff, under such a state of facts, should not invoke the aid of a court of equity to put forth its hand to remove the guardians and protectors of the unwary stranger. The plaintiff has a complete remedy within himself. As soon as the evil within is removed, the nuisance

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without should be abated. In addition to this, the plaintiff has a remedy at law for any wrongful or malicious interference of any person with his business, and when a party has such means of redress, the equitable powers of the court by injunction may not be invoked. The police department has its domain of duty and action. A court of equity should not interfere to paralyze this arm of the public safety and security, or weaken the force of the just and wholesome exercise of its powers. The defendants disavow, under oath, any intention to injure the plaintiff, and assert that they have acted only in the discharge of their duty under the law organizing the police department.

Motion for injunction denied.

SUPREME COURT.

JACOB SHALL agt. HERKIMER GREEN.

In an action before a justice of the peace for trespass on land, the plaintiff, in his complaint, described his entire farm of seventy acres by metes and bounds, and alleged the trespasses to have been committed thereon, and claimed damages in gross "for the several aforesaid trespasses and grievances;" and the defendant interposed a general denial, and then set up a separate defense, alleging title in himself to a certain portion of the premises, describing it by metes and bounds, and alleged that "some or one" of the alleged trespasses were committed on that piece of land. The justice discontinued the whole action; and on the trial in the supreme court, no evidence was given of any trespass on this particular piece of land, and no question of title was raised by the proofs, and it was found that the trespasses were committed on the plaintiff's land, as to which there was no question of title, and the damages awarded amounted to some \$26.

Held, that the defendant was entitled to costs. (See *Hall agt. Hodskins*, 30 How. 15.)

Syracuse Special Term, April, 1857.

MOTION to set aside judgment.

GEORGE A. HARDIN, *for plaintiff.*

D. PRATT & S. H. DE CAMP, *for defendant.*

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BACON, J. I think costs were properly taxed in this case for the defendant. In the complaint before the justice, the plaintiff described his entire farm of seventy acres by metes and bounds, and alleged the trespasses to have been committed thereon, without any definite locality, and claimed damages in gross for "the several aforesaid trespasses and grievances." The defendant interposed a general denial, and then set up a separate defense, alleging title in himself to a certain portion of the premises, describing it minutely by metes and bounds, and alleged that "some or one" of the alleged trespasses were committed on that piece of land of which he was the owner. The justice thereupon discontinued the whole action: and on the trial in the supreme court, no evidence was given of any trespass on this particular piece of land, and no question of title was raised by the proofs, and it was found that the trespasses were committed on the plaintiff's land, as to which there was no question of title, and some \$26 damages were awarded to him.

The 62d section of the Code seems to me clearly to provide for this case. The answer of the defendant limited his defense as to some or one of the causes of action to the precise *locus in quo* described by him. If the plaintiff had not expected to recover for any trespass on this land (as it would seem from the result he did not), the action as to this special defense should have been discontinued, leaving the plaintiff to commence another action therefor in the supreme court, if he chose; and as to the other causes of action, the proceedings should have been continued before the justice. This seems to me to be the precise object of the section, and it thus protects both parties, and leaves the plaintiff to recover, when he has that right, in his own forum, and at the smallest expense. If, however, he chooses to put in issue the defense interposed by the defendant, and which for his own protection he was bound to set up, he does it at the peril of the costs, in case he fails on this issue, or does not recover enough damages for the trespasses as to which he was entitled to

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recover, to carry costs. That was this case, and the result entitled the defendant to his costs.

The principle on which the court proceeded in *Hall agt. Hodskins* (30 How. 15), covers this case. There the plaintiff complained for trespasses on his farm between certain days. The defendant answered that, as to all the acts of entering and breaking the close, &c., the same were done in a certain road which the defendant had a right to use, and there was a general denial, &c. The suit was discontinued, and the action commenced in the supreme court, and came on for trial at the circuit, when, after defendant had given some evidence as to there being a road laid out across the plaintiff's close, the plaintiff's counsel announced that he would claim no damages for any trespasses on the alleged road, but only for trespasses committed outside of the road, and the plaintiff accordingly had a verdict for \$1.56. Upon this, a motion was made at special term, by the defendant, for costs against the plaintiff (deducting the amount of the verdict), and it was granted. On appeal to the general term the order was reversed, and the plaintiff was declared entitled to costs.

But in looking at the opinion of the court, it will be found that the decision proceeded upon the ground that the plea of title was *a full answer to the whole complaint*. The cause of action alleged in the complaint was breaking and entering the close of the plaintiff, and the entry, which was the entire gravamen (the other alleged acts being merely matters of aggravation), was wholly justified under an alleged right of way. Now, in that case, the defendant might have justified as to the alleged trespasses committed on certain days, and put in a different defense as to those committed on other days; or he might have described the alleged road by metes and bounds, or in some other way given it a definite locality; and as to entries thereon, pleaded a right of way; and as to other alleged trespasses, a general denial, or any other defense. The court say that the defendant, by his answer, justified the acts of entering the plaintiff's close, and that it

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went to the plaintiff's *entire right of recovery*. "The defendant had it in his power," the court say, "to limit his justification to such acts of entry upon the *locus in quo* as were protected by his right of way. If, therefore, he wished to defend under his right of way, he should have described the way, and set up his right in justification of his acts in passing and re-passing over that portion of the *locus in quo*." That is precisely what the defendant did in this case. He made the distinct issue as to alleged trespasses on the premises described by him, with a minuteness that apprised the other party of the precise locality, and thus tendered the plaintiff a distinct issue as to the limit of his justification; and this left the trespasses on all other parts of the plaintiff's close within the jurisdiction of the justice, and triable by him.

The case of *Burhans agt. Tibbits* (7 How. 74), holds that the judgment which, under section 61 of the Code, entitles the plaintiff to costs, is one *in hostility* to the title set up by defendant. This is not that case, and the defendant is therefore entitled to costs.

As the question is one not heretofore precisely determined, and is very properly made, I deny the motion to set aside the judgment, without costs to either party.

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SUPREME COURT.

JAMES BELGER agt. WILLIAM B. DINSMORE, President and Treasurer of the Adams Express Company.

A receipt given by an *express company* for goods delivered to it for carriage, does not require a *United States revenue stamp* to be affixed to it.

An *express company* is to be regarded as a *common carrier*, and their responsibility for the safe delivery of property intrusted to them is the same as other common carriers. But they may limit their liability by *express contract*.

A common carrier receives a consideration for the carriage of property, and he is bound to carry it accordingly; he cannot, by a mere *notice*, relieve himself from that liability. Even proof of such notice being brought to the knowledge of the

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owner, would not be sufficient to relieve the carrier of liability; but an *express contract must be proven.*

The mere acceptance of a receipt of the carrier by the owner or shipper, limiting the liability of the carrier, is not proof of an express contract between the parties, settling and limiting such liability.

New York General Term, January, 1868.

THE plaintiff sues the defendant to recover the value of a trunk placed in charge of the express company, and lost while under their care. The loss was not disputed on the trial. The plaintiff valued the trunk and contents at \$467.

The defendant offered in evidence a receipt, given at the time of receiving the trunk, on which was a stipulation on the part of the company, limiting their liability in various ways. The only part material in this controversy is as follows: "Nor in any event shall the holder hereof demand "beyond the sum of fifty dollars, at which the article for "warded is hereby valued, unless otherwise herein expressed, "or unless specially insured by them, and so specified in this "receipt, which insurance shall constitute the limit of the "liability of the Adams Express Company."

The articles included in this receipt were six trunks and three boxes. One of the trunks was lost.

Upon the trial, the admission of the receipt in evidence, when offered by the defendant, was objected to, on the ground that it was not stamped, which objection was overruled, and plaintiff excepted. The court then permitted defendants' counsel to affix a stamp in court.

The admission of the receipt in evidence was also objected to on the ground that there was no evidence that the knowledge of the contents of the receipt ever came to, or was brought home to, the plaintiff; which objection was overruled, and the counsel for the plaintiff excepted.

The plaintiff asked to submit the question of negligence to the jury, which the court refused, and held that the receipt was a contract between the parties, and the defendant was excused from all liability except as stated in the receipt, and the judge so charged the jury, and directed the jury to find a

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verdict for the plaintiff for \$50 and interest; to which the plaintiff excepted. The jury so found. The court added, exceptions heard at general term in the first instance, and judgment was suspended.

ROWLAND M. HALL, *for plaintiff.*

I. The Adams Express Company, the respondent, are governed by the rules of law applicable to common carriers, in their character of express agents, forwarders, and bailees for hire. (*Sweet agt. Barney*, 23 N. Y. R. p. 335.)

In this case, the court of appeals held "that the defendants (an express company) "were common carriers," and said, "persons whose business it is to receive pack- "ages of bullion, coin, bank notes, commercial paper, and such other articles of value "as parties see fit to entrust to their care, for the purpose of transporting the same "from one place to another for a compensation, are common carriers, and responsible "as such, for the safe delivery of property intrusted to them."

The supreme court of Massachusetts has just decided in the same way, in the case of *Buckland & Co. agt. The Adams Express Company*.

"In this country, in recent times, the business of carrying goods is almost monopo- "lized by what are called expressmen." "These are undoubtedly common carriers." (*Parsons' Mercantile Law*, p. 202.)

"The general principles of agency extend to common carriers, and make them lia- "ble for the acts of their agents done while in the discharge of the agency or "employment." (*Parsons' Mercantile Law*, p. 216.)

II. The appellant made out his case upon the trial as to the bailment of the property in question to the respondent, without alleging any written contract; and the respondent, by resting the defense upon a receipt, having written upon it a notice limiting his liability in case of loss, which he offered in evidence in proof of the contract between the appellant and himself, elected to subject himself to the application of the strict rule of law in reference to contracts. And the question whether or not that notice was brought home to the appellant, and whether, if so, it was assented to by him, were questions of fact, which should have been left to the jury to determine upon all the evidence, under the direction of the court.

"No party will be affected by any notice, unless a knowledge of it can be brought "home to him." "The question is one of fact, which the jury will determine upon all "the evidence, under the direction of the court." (*Parsons' Mercantile Law*, p. 223; *Dorr agt. New Jersey Steam Navigation Company*, 11 N. Y. R. p. 485.)

His honor Judge BALCOM erred, therefore, in holding "that the taking of the "receipt by the plaintiff's wife, when she delivered the trunk to the express agent, "was evidence that she then knew its contents," and in holding "that said receipt "was itself a contract between the plaintiff and the defendant, and that the fact of "its acceptance by the plaintiff, as shipper of the goods in question, at the time of the "shipment of said goods, was sufficient evidence of notice to the plaintiff of its con- "tents being brought home to the knowledge of the plaintiff, or his attention being "directed to it, and that the fact of such knowledge must be presumed from the "receipt being accepted."

The case of *Brown agt. Eastern Railroad Company* (11 Cushing. p. 97), was an action of assumpsit for lost baggage. There was a notice printed on the back of the passage ticket given to the plaintiff, that the defendants would not be responsible beyond a specified sum; but no other notice was given, nor was the plaintiff's attention called

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to this. Held, that these facts did not furnish that certain notice which must be given to exonerate the carrier from his liability.

The same doctrine has very recently been held in the supreme court, circuit, of Kings county, by his honor Judge GILBERT, in the case of *Williams agt. Dodd*; but in this case the receipt was put in evidence by the plaintiff, and not by the defendant.

In the case of *The Camden and Amboy Railroad Co. agt. Baldau* (16 Penn. State R. p. 67), it was held incumbent on the carrier to prove that the passenger had actual knowledge of the limitation in the notice.

His honor Judge BALCOM erred further in his ruling, quoted above, inasmuch as his decision prevented the appellant from adducing testimony upon the point as to whether or not the notice was assented to by him, and in confounding the act of taking the receipt with the notice printed upon it, with that acceptance which would imply assent to its terms.

"A common carrier cannot screen himself from liability by notice, whether brought home to the owner or not. Notice is no evidence of assent on the part of the owner and he has a right to repose on the common law liability of the carrier, who cannot relieve himself from such liability by any act of his own." (19 Wend. p. 234; *Dorr agt. New Jersey Steam Navigation Company*, 11 N. Y. R. p. 485.)

"It is well settled, by the weight of authority in this country, that a mere notice that the carrier is not responsible, or his refusal to be responsible, although brought home to the knowledge of the other party, does not necessarily constitute an agreement. The reason is this: the sender has a right to insist upon sending the goods, and to leave the carrier to his legal responsibility, and the carrier is bound to take them on these terms." "The law will not presume, from his sending, an assent to the carrier's terms. (*Parsons' Mercantile Law*, p. 223.)

III. But, even if the receipt and notice constituted a contract binding upon the parties, the respondent is still liable for negligence and carelessness, if these can be proved or lawfully inferred.

His honor Judge BALCOM erred, therefore, again, in refusing leave to the appellant to introduce proof on the point of negligence, and in refusing leave to go to the jury on this point, and in holding "that the receipt was to all intents and purposes a contract between the parties, and that the defendant was by it excused from all liability except as stated in the receipt."

"It should be remarked, that such notice affects the liability of the common carrier only so far as it is peculiar to him, that is, his liability for a loss which occurs without his agency or fault; for he is just as liable as he would be without notice, for a loss or injury caused by his own negligence or default." (*Parsons' Mercantile Law*, p. 224.)

"A common carrier has in truth two distinct liabilities: the one for losses by accident or mistake, where he is liable by the common law as an insurer; the other for loss by default or negligence, where he is answerable as an ordinary bailee." (*Dorr agt. New Jersey Steam Navigation Company*, 11 N. Y. R. p. 485.)

In the present case, the failure of the respondent to account for the loss of the property in question by accident, or in any way, gives rise to the just inference that the loss was caused by the gross negligence and default of the respondent and his agents in the premises.

CLARENCE A. SEWARD, for defendant.

I. A common carrier may limit his liability Upon this point, as positive precedent supplies the authority, argument *a priori* is unnecessary. (*York Company agt. Cen-*

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trial Railroad, 3 Wallace, *Sup. Court U. S.* 111; Parsons agt. Montith, 13 Barb. S. C. R. 353; Moore agt. Evans, 14 Id. 524; Dorr agt. New Jersey Steam Navigation Company, 1 Kornan, 485; Lee agt. Marsh, 43 Barb. S. C. R. 102.) In this last case, LEONARD, P. J., said: "I think it must be considered as settled, in this state, that common carriers may limit their liability for negligence, in almost any respect, by express contract," and, "that such contracts are not against public policy." This was concurred in by SUTHERLAND and BARNARD, Justices.

II. The receipt given in evidence constituted a contract between the parties.

(a.) It is called in the receipt itself an "agreement" and a "contract."

(b.) It was so construed at *Nisi Prima*.

(c.) It specifies the terms upon which the carriage was undertaken, and in so doing extends beyond the simple acknowledgment of the delivery of the subject of transportation. The receipt was a bill of lading.

III. The limitation of value to \$50, unless otherwise expressed in the agreement itself, was valid.

1. The reward of the carrier is predicated of the value of the thing carried. Such apportionment is reasonable, because the value is the prime element of risk, and the law allows compensation proportioned to risk.

2. This stipulation limits the common law liability of the carrier as insurer, and is as reasonable as an agreement in a policy to abridge the statutory period of limitation. Such insurance agreements are valid. (*Gray* agt. *The Hartford Fire Ins. Co.* 1 Blatch. C. C. R. 280; *Reilly* agt. *The Etna Ins. Co.* 30 N. Y. R. 136; *Roach* agt. *N. Y. and E. Ins. Co.*, *Id.* 546.)

3. This very stipulation, and others, differing in amount only, have been frequently the subject of judicial sanction. (*Van Toll* agt. *The S. E. Railway Co.* 12 C. B. N. S. 104; *Hag. Com. Law*, 75; *Nestadt* agt. *Adams*, 4 Duer, 43; *Van Winkle* agt. *Adams Express Company*, MS., *Hoffman*, *Pierrepont* and *Robertson*, Justices; *Gagnon* agt. *The American Express Company*, MS., *Nash*, Referee; *Parker* agt. *Dinsmore*, MS., *Cowles*, Referee; *Meyer* agt. *Harden Express*, 24 *How. Pr. R.* 290; *Moriarty* agt. *Hardey Express Company*, 1 *Daly*, 227; *Boorman* agt. *American Express Co.*, MS., *Supreme Court of Wisconsin*.)

IV. In the present case, the issuance and acceptance of the receipt constituted a valid agreement, effectually limiting the liability of the defendant at \$50 in case of loss.

(a.) As to the defendant, the consignor and consignee were identical. The goods were delivered by her and were addressed to her. In the absence of knowledge, the legal presumption is in favor of the ownership of the consignee. (*Sweet* agt. *Barney*, 23 N. Y. 335.) But where, as here, consignor and consignee are one and the same, the carrier has at least a right to suppose that the consignor is competent to contract as to the terms of carriage. Such, indeed, would be the rule, if the consignee were another person. (*Moriarty* agt. *Hardey Express*, 1 *Daly*, 227.)

(b.) All bills of lading are unilateral, and yet are universally held to conclude the shipper. A promissory note, when paid by its maker, belongs to him, and equity will compel its restoration, though the holder never entered into any agreement to return it. The sender of a telegram is concluded by the conditions contained in the printed blanks for messages, furnished by the telegraph company. (*Breese* agt. *U. S. Tel. Co.* 45 Barb. 274; *MacAndrew* agt. *The Electric Tel. Co.* 17 Com. R. 84 E. C. L. 3.) The conditions of a policy are binding upon the assured, though not signed by him. In fine, the majority of human contracts are unilateral, and repose for their obligation upon the assent which the law implies from their acceptance.

(c.) The plaintiff stipulated that the receipt was issued to him, and received by him, as shipper, and he produced it on the trial. This implies both knowledge and assent.

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In this country the legal presumption is in favor of education and of an ability to read. (*See Common Schools generally.*) If the reception and retention of an unpaid account without objection, is sufficient to enable the creditor to recover upon an *instant computassent*, or a stated account (12 Wend. 413; 1 Kernan, 172; 12 Pet. 330; 45 Barb. S. C. R. 490), *a fortiori vix dubitari posse videtur*, that the reception and retention of a bill of lading will conclude the educated shipper, unless he proves his dissent. The burden is upon him to show ignorance or dissent.

In *King agt. Woodbridge* (34 Vermont, 571), it was said that "a paper being shown to be in the custody of the plaintiff, a due and proper delivery of it to him, and of his assent to its terms, are to be presumed, and the burden is thrown on the plaintiff to obviate these presumptions by proof. It is for the plaintiff to show the circumstances under which the paper came into his possession, that he never assented to its terms, and that there was no such delivery of it as to make it operative as a binding contract." This was cited and enforced by the supreme court of Wisconsin in the case before referred to.

But, upon authority, this whole question is beyond argument. In *Van Toll agt. The S. E. Railway Co.* (*supra*), the stipulation was that "the company will not be responsible for any package exceeding the value of £10." There was no proof that the plaintiff had read the ticket. She had a verdict for £20. ERLE, Ch. J., WILLES, BYLES, KEATING, Justices, unanimously set it aside, holding that acceptance of the ticket was assent to the terms thereon printed.

In *Dorr agt. The New Jersey Steam Navigation Company* (*supra*), the receipt contained the following clause: "No package whatever, if lost, injured or stolen, to be deemed of greater value than two hundred dollars." The plaintiff proved that such receipt did not come to their knowledge, otherwise than by delivery to their carman, until the day after the goods were shipped. The court refused to charge that the liability of the defendants for a total loss by fire was limited to \$200. The court of appeals said: "The exceptions to the common law liability being made in the bill of lading, and delivered to the agent of the plaintiff, must be deemed to have been agreed upon by the parties." This decides:

1. That acceptance is assent;
2. That a receipt is a bill of lading.

The railway ticket cases, in the same court, further illustrate the rule. (24 N. Y. 182; *Id.* 215; *Id.* 223; 25 *Id.* 445.)

In *The York Co. agt. The Central Railroad* (*supra*), the judge charged the jury, that "it is competent for the carrier alone to limit his liability, without the engagement of the owner."

(d.) It follows from these views that the plaintiff's objections to the legal character of the receipt, and his offers of evidence to contradict its legal effect, were properly disposed of at the circuit.

V. The receipt did not require an internal revenue stamp. It was expressly exempted therefrom. It was an economy of time and labor to affix it, and obviated any necessity for an argument or citations of various statutes, not then in court. If it did not require a stamp, the affixing one was inutile and harmless. If it did require a stamp, as insisted by the plaintiff, then the same law which rendered the stamp necessary authorized it to be affixed in court. The receipt was dated "May 4, 1864." The 163d section of the act of June 30, 1864 (13 U. S. Stat. at Large, 295), provides as follows:

"And be it further enacted, That no deed, instrument, document, writing, or paper, required by law to be stamped, which has been heretofore signed or issued without being duly stamped, or with a deficient stamp, nor any copy thereof, shall be recorded, or admitted, or used as evidence in any court, until a legal stamp or stamps,

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denoting the amount of duty, shall have been affixed thereto, and the date when the same is so used or affixed, with his initials, shall have been placed thereon by the person using or affixing the same; and the person desiring to use or record any such deed, instrument, document, writing or paper, as evidence, his agent or attorney is authorized, in the presence of the court, register or recorder, respectively, to affix the stamp or stamps thereon required: *Provided*, That no instrument, document or paper, made, signed or issued prior to the passage of this act, without being duly stamped, or having thereon an adhesive stamp or stamps, to denote the duty imposed thereon, shall, for that cause, if the stamp or stamps required shall be subsequently affixed, be deemed invalid and of no effect."

This authorized the affixing of the necessary stamps, either in court or out of court. *Omnis magis, &c.* The power to require a stamp implies the power to prescribe the time when the stamp must be affixed; and the force of the plaintiff's objections to the defendant's affixing it is not perceived.

VI. There should be judgment for the plaintiff upon the verdict for its amount, of \$55.83. The costs should be apportioned as provided at the circuit, and the motion for a new trial should be denied.

By the court, INGRAHAM, J. Two questions are submitted to us in this case: one, whether a receipt by an express company requires a stamp; and second, whether such receipt, which limits the liability of the express company, is a contract between the parties, protecting the company from liability except as stated therein, without any proof of knowledge on the part of the holder of the contents thereof.

First. The objection to the admission of the receipt without a stamp has been examined by the general term of this district, in the case of *De Barre and others agt. The Hope Express Company*. It was there held that the stamp was not required, and that the exception in the act of 1865 covered such a receipt.

Second. The principle question in the case is, as to the extent of the defendant's liability, and whether an express company can, by a notice, or by an exception, in a receipt which is not shown to have come to the knowledge of the shipper or holder, exempt themselves from liability in whole or in part, if the article is lost through the negligence of the express company.

That the defendant's company is to be regarded as a *common carrier*, and their responsibility for the safe delivery of property intrusted to them is the same as theirs, has been

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settled by various decisions. (*Russell agt. Livingston*, 19 *Barb.* 346; *Sherman agt. Wells*, 28 *Barb.* 403.) And the same has been distinctly held by the court of appeals in *Sweet agt. Barney* (23 *N. Y. R.* 335).

It is equally well settled that a common carrier may, by express contract between himself and the party contracting with him, agree to a limitation of his liability. (*Parsons agt. Monteith*, 13 *Barb.* 353; *Moore agt. Evans*, 14 *Barb.* 524; *Dorr agt. The New Jersey Steam Navigation Company*, 11 *N. Y. p.* 485.) In the latter case it is said: "That a carrier "may by express contract restrict his common law liability, "is now, I think, a well established rule of law." (*Lee agt. Marsh*, 43 *Barb.* 102; *York Co. agt. Cen. R. R. Co.* 3 *Wallace U. S. R. p.* 111.)

The decisions in this state have also settled that a common carrier cannot relieve himself from liability, either in whole or in part, by a mere notice indorsed upon the ticket or receipt.

Hollister agt. Newton (19 *Wend.* 234), in which it was held that the carrier's notice, even if brought home to his employee, could not be sufficient to infer an express contract. The argument there used is that the carrier is bound to receive and carry goods delivered to him, for which duty he receives a compensation. He has no right to prescribe other terms; and a notice, at most, is only a proposal for a special contract, which requires the assent of the other party.

In *Bisell agt. New York Central Railroad Company* (25 *N. Y.* 442), SELDEN, J., says: "The question appears to be settled that the companies cannot limit their responsibility by any notice, though expressly brought to the knowledge of those whose persons, or whose property, they carry; but they may secure such limitation by express contract with those persons.

These cases all rest on the principle that the carrier receives a consideration for the carriage, and he is bound to

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carry the goods accordingly; that he cannot, by a mere notice, relieve himself from that liability; that even proof of its being brought to the knowledge of the owner would not be sufficient to relieve the carrier's liability, but that an express contract must be proven.

There is another class of cases where the carriage of passengers on free tickets, without compensation, does not involve the application of this strict rule; but that rests on a different principle; it is not applicable to the present case.

Upon the trial of this case, the justice not only refused to submit to the jury the question whether there was any evidence of a contract between the parties, but expressly held that the contents of the receipt were a binding contract between the parties, limited the defendant's liability to \$50 and interest, and directed a verdict for the plaintiff for that amount.

In this the learned justice erred, and a new trial must be ordered. Verdict set aside; new trial ordered, costs to abide event.

Concur, GEORGE G. BARNARD.

Concur, J. SUTHERLAND.

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N. Y. SUPERIOR COURT.

HENRY D. BROOKMAN and another agt. BENJAMIN F. METCALF.

A promise by the defendant, that if the plaintiffs would suspend bringing an action upon the second note of the defendant, he would abide by the decision of the first action upon a similar note of the defendant, if it amounted to a promise to pay, was not sufficient to take the note out of the operation of the statute of limitations —not being in writing.

Where the plaintiffs, upon the faith of such promise by the defendant, delayed bringing an action upon the second note, until after the decision of the action upon the first note, and until after the statute of limitations had attached: *Held*, that the defendant, upon the doctrine of *equitable estoppel*, or *estoppel in pais*, was precluded from setting up the statute of limitations as a defense.

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General Term, February, 1867.

ON the 8th of November, 1855, the defendant made two promissory notes, each for five hundred dollars, payable respectively in six and twelve months after date, to his own order.

The complaint alleged that, through successive indorsements, the notes were transferred to the plaintiffs; that they were not paid; and that after both had matured, and on or about the 11th of February, 1857, the plaintiffs commenced an action upon the six-months note. That the defendant put in answer to the complaint in such action; that the issue was tried by a referee, who dismissed the complaint with costs. That the plaintiffs appealed from such judgment to the general term, where the judgment was reversed, and a new trial ordered. That the defendant thereupon appealed to the court of appeals, stipulating that if such order granting a new trial was affirmed, judgment absolute should be entered against him in favor of the plaintiffs. That the court of appeals, on the 18th day of July, 1865, affirmed such order; and judgment absolute thereupon was entered against the defendant.

The complaint further alleged, that while said appeal to the court of appeals was pending, and in the year 1860, the plaintiffs directed their attorney to commence an action upon the twelve-months note, and so informed the defendant; "whereupon, the defendant requested the plaintiffs not to commence such action against him, and to forbear enforcing judgment, while the appeal in the other case was pending; and to induce the plaintiffs so to forbear, he, the defendant, then and there, in consideration of the premises and of such forbearance, promised and agreed to and with the plaintiffs, that if they would desist from commencing such or any action thereon to recover the same until after the decision and judgment should be rendered upon the appeal as aforesaid, he would immediately upon such decision and judgment, if the same should be against him, pay the amount due for princi-

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pal and interest upon said note, without any action thereon." That thereupon the plaintiffs revoked the said order to their attorney, and did not commence any action upon said note.

The complaint further alleged, that after the decision of the court of appeals, affirming said order, and rendering judgment absolute, as aforesaid, they demanded of the defendant payment of said twelve-months note; which was refused.

The defendant denied that he requested the plaintiffs not to commence any action against him or to forbear enforcing judgment while the appeal in the other case was pending; and he alleged that the cause of action did not accrue within six years before the commencement thereof.

The action was tried before Mr. Justice JONES and a jury.

Henry D. Brookman, one of the plaintiffs, testified that after the decision of the general term, he directed a suit to be commenced on the second note. About that time he met the defendant in Wall street, and told him he was going to sue him on the second note; his reply was, that he did not want to have any further litigation in the matter; and if I would suspend it, he would abide by the decision of the first. He, plaintiff, then went to his attorney, and he laid it all over. This conversation was about the time the defendant appealed to the court of appeals, and in the spring of 1860. The order to commence the suit upon the second note, and the subsequent countermand, were also testified to by the attorney.

A motion was made to dismiss the complaint on the grounds: (1.) that the acknowledgment or promise relied on by the plaintiffs was not sufficient evidence of a new or continuing contract to take the case out of the statute of limitations, because the same was not in writing signed by the party to be charged thereby; and (2.) that the plaintiffs had not tendered the bond required by the statute in a suit upon a lost note, there having been evidence that the note in suit was lost.

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The motion was denied, and the defendant excepted.

The defendant testified that he had no such conversation with the plaintiff as he, the plaintiff, had testified to.

The plaintiffs tendered to the court a bond, as required by the statute in a suit upon a lost note; which bond was approved by the court.

The case was submitted to the jury, who found for the plaintiffs.

The exceptions were ordered to be heard in the first instance at the general term, and judgment in the meantime to be suspended.

S. P. NASH for plaintiffs.

L. K. MILLER for defendants.

By the court, MONELL, J. The promise of the defendant, that if the plaintiffs would suspend bringing an action upon the second note, he would abide by the decision of the first action, if it amounted to a promise to pay, was not sufficient to take the note out of the operation of the statute of limitations. Such promise is now required to be in writing (*Code*, § 110), and signed by the party to be charged.

The offer, however, to abide by the decision of the action upon the first note, was made and accepted before the statute of limitations attached to the second note. The consideration of the two notes seem to have been the same, and they were subject to the same defenses. A suit was about being commenced upon the second note before the determination of the first action, probably with the view of saving the statute. The defendant, upon being informed of such intended suit, stated to the plaintiffs that he did not want any further litigation in the matter; and that if they would suspend it, he would abide by the decision of the first. Influenced by such offer, the plaintiffs delayed bringing an action upon the second note until after the decision of the action upon the first note, and until after the statute of limitations had attached.

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These facts are found by the verdict, which is general upon all the issues, in the plaintiffs' favor.

It seems to me, upon the doctrine of equitable estoppel, or estoppel *in pais*, the defendant ought not to be allowed to disregard his engagement and set the statute up as a defense.

The offer of the defendant was with the intention of influencing the plaintiffs in reference to their contemplated suit upon the second note; and the plaintiffs, acting under such influence, suspended all proceedings; and continued passive until the decision of the first action. No one can doubt, and so the jury found, that the suspension of action upon the second note, was in consequence of the promise of the defendant to abide by the first suit. It is not necessary, to an equitable estoppel, that the party should design to mislead. If his act was calculated to mislead, and actually has misled another, who acted upon it in good faith, it is enough (*Manufacturers and Traders' Bank* agt. *Hasard*, 30 N. Y. R., 216).

Mr. Parsons states the rule thus: "when a man has made a declaration or a representation, or caused, or in some cases not prevented, a false impression, or done some significant act, with intent that others should rely and act thereon, and upon which others have honestly relied and acted, he shall not be permitted to prove that the representation was false, or the act unauthorized or ineffectual, if any injury would occur to the innocent party, who had acted in full faith in its truth or validity" (2 *Pars. on Con.*, 340.)

Instances of *estoppels in pais*, are numerous. A maker of a promissory note, having represented to the holder, that it was given for value received, cannot set up the defense of usury (*Holmes* agt. *Williams*, 10 *Paige R.*, 326; *Clark* agt. *Sisson*, 4 *Duer*, 408; *Ferguson* agt. *Hamilton*, 35 *Barb.*, 427). In *St. John* agt. *Roberts* (31 N. Y. R., 441), the indorsers of a promissory note, who had caused the note to

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be sold at public auction, were estopped from setting up a want of demand and protest.

In *Gaylord agt. Van Loan* (15 Wend., 308), the defendant, upon being applied to for payment of certain demands, the person applying saying the demands must be sued unless they were renewed, answered, that he would not avail himself of the statute, and a suit need not be brought on that account—*held*, an estoppel. And in *Brown agt. Sprague* (5 Denio, 545), in several ejectment suits, there was an agreement that all should abide the result of one, and proceedings be stayed in the others; and it was held, that the defendant should abide by his engagement.

The effect of the defendant's promise to abide by the decision of the first suit, was to postpone all action upon the second note until after the statute had attached. There was no negligence on the part of the plaintiffs; they were about to proceed to save the statute, when they were met by the defendant's promise, and in good faith acted upon it. The case is stronger against the defendant than *Gaylord agt. Van Loan* (*supra*); and he must be held to his engagement. The tender of the bond of indemnity, at the trial and before verdict, was sufficient (2 R. S., 406, § 76; *Des Arts agt. Leggett*, 5 Duer, 156).

The exceptions must be overruled, and judgment ordered for the plaintiffs on the verdict.

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N. Y. SUPERIOR COURT.

SIEGMUND MEYER and another agt. HARRIS FIEGEL and another.

If the facts proven on the trial establish a cause of action, the court may allow the complaint to be amended. (Code, § 173.) In the like case, the court may conform the pleadings to the facts proved. (Id.)

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The power to amend a pleading, or to conform it to the facts, is *discretionary*; but it may be exercised in the cases and under the limitations contained in said section (173). If, therefore, on the trial, the defect in the complaint is supplied by proof, the objection may be overruled.

Where, on the trial, evidence is offered, before a motion is made to dismiss the complaint, which may overcome the objections to the complaint, rendering it proper in the discretion of the court to allow an amendment or to conform the pleadings to the facts, it is error to reject such evidence.

General Term, February, 1867.

THIS action was brought to recover the difference between the contract price of a quantity of glazed wire, and the price such wire brought at auction sale, after the defendants had refused to accept a delivery.

The complaint alleged that the plaintiffs were sole agents for a certain article of commerce known as "Washburn & Moen's crinoline springs." That as such agents it was their business to receive orders for such springs, and upon such orders to order them from the manufacturers; they, the plaintiffs, in fact, obtaining them and delivering them to the parties giving the orders. That their mode of business was to enter upon a book, called an order book, such orders as they received, and, upon the faith of such orders, to order from the manufacturers a corresponding quantity for re-sale to the parties giving the orders. That the defendants gave to the plaintiffs an order as follows: "Gentlemen—Please to enter for me, on your order book, twenty-five barrels of Washburn & Moen's glazed wire, at the rate of 77 for 18, 3 per cent discount." That the meaning of said order was, that the plaintiffs should order the wire and sell the same to the defendants. That the plaintiffs did order the wire, and notified the defendants, and subsequently informed them that they had received the same, and had it ready to deliver to them. That afterwards the plaintiffs delivered to the defendants nine barrels of springs, parcel of said order, which the defendants accepted. The complaint then alleged an offer to deliver the residue of barrels of wire, a refusal by defendants to receive, a subsequent sale, and a deficiency.

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The answer denied nearly all the allegations in the complaint.

Upon the trial before Mr. Justice BARBOUR and a jury, the plaintiffs read in evidence the written order of the defendants, and then called Seigmund T. Meyer, who testified that he was one of the plaintiffs; and the plaintiffs' counsel thereupon propounded to the witness the following interrogatories, each and every of which was objected to by the defendants' counsel, on the ground that the testimony sought to be elicited was irrelevant and inadmissible under the pleadings herein:

Q. Upon this order (showing to witness "Exhibit A"), what did you do, if anything, to obtain twenty-five barrels of wire for Fiegel & Strauss?

Q. Did you purchase from Washburn & Moen twenty-five barrels of wire?

Q. Was there any time fixed between you and Messrs. Fiegel & Strauss, relative to the delivery of this wire?

Q. Was there any agreement between you and Messrs. Fiegel & Strauss in regard to the various prices which you were to deliver?

Q. What is the explanation, according to the trade, of the words "of 77 for 18, 3 per cent discount," in the defendants' letter of August 23, 1864, and of your saying on the basis of 77 cents per lb. for No. 18?

Each and every of said objections to said several questions were sustained by the court; each and every of said questions were overruled; and to the decision in regard to each question separately the plaintiffs' counsel excepted.

The plaintiffs' counsel asked for leave to amend the complaint, by substituting the word "purchasing" for the word "obtaining," in the phrase "they (the plaintiffs) in fact obtaining them." Which motion the court denied; and to which decision the plaintiffs' counsel then and there excepted.

The plaintiffs not offering any further evidence, the

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defendants' counsel moved to dismiss the complaint on the grounds :

First. That it appeared by the complaint that the plaintiffs had no interest in the subject matter of controversy, and therefore could not maintain this action.

Second. That the facts stated in the complaint did not constitute a contract between the parties, nor between the defendants and Washburn & Moen.

Third. That the complaint did not show, and the facts therein stated did not constitute, a cause of action.

Whereupon the court granted such motion and dismissed the complaint ; to each and every part of which decision the plaintiffs' counsel then and there excepted.

The judge thereupon, on motion of plaintiffs' counsel, directed the exceptions to be heard in the first instance at the general term, and that judgment in the meantime be suspended.

P. J. JOACHIMSEN, *for plaintiffs.*

A. BOARDMAN, *for defendants.*

By the court, MONELL, J. No question arises in this case upon the exceptions of the plaintiffs to the dismissal of their complaint. If the ruling of the learned justice in excluding the evidence offered in support of the plaintiffs' claim was correct, then there was no error in dismissing the complaint, for there was no evidence to support the cause of action. Nor can we now consider the question of the sufficiency of the facts stated in the complaint as constituting a cause of action. When the plaintiffs' evidence was excluded, a motion had not been made to dismiss the complaint on the ground that there was not a cause of action stated, nor upon any ground ; and if the complaint was open to the objection, the deficiency in the statement might have been supplied by proof. I cannot subscribe to the practice of allowing a defendant to wait until the plaintiff has closed his case, with-

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out objecting to the sufficiency of the complaint, and then objecting. Such objection, it is true, is not waived by answering; but if the defendant does answer and goes to trial, he should not be allowed to take the objection after the plaintiff's proof is in, provided such proof establishes a cause of action. The court of appeals, in *Smith agt. Countryman* (30 N. Y. R. 655, 668), discourages such practice, and holds that if new matter be inserted in an answer not constituting a defense, it should be demurred to; and that the practice resorted to in that case to correct the pleadings by motion at the trial, was not warranted by the Code, "and should not be encouraged." So it has been frequently held that such objection to the complaint cannot be first taken on appeal. (*Pope agt. Dinsmore*, 8 Abb. 429; *Winterson agt. Eighth Av. R. R. Co.* 2 Hilt. 389.) If, however, it is proper to allow such practice, it should be subjected to certain well understood rules, made applicable by the Code, in determining the sufficiency of pleadings, and to the power of the court to grant amendments.

First. If the facts proven establish a cause of action, the court may allow the complaint to be amended. (Code, § 173.)

Second. In the like case, the court may conform the pleadings to the facts proved. (*Id.*)

The power to amend a pleading or to conform it to the facts is discretionary; but it may be exercised in the cases and under the limitations contained in the section I have referred to. If, therefore, on the trial, the defect in the complaint is supplied by proof, the objection may be overruled. (*Lounsbury agt. Purdy*, 18 N. Y. R. 521; *Emery agt. Pease*, 2 *Id.* 64.)

When the questions were propounded to the witness Meyer, a motion to dismiss the complaint had not been made, and the answers to such questions might have overcome the objections to the complaint, by proving a contract of sale from the plaintiffs to the defendants, rendering it proper, in the discretion of the court, to allow an amendment

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or to conform the pleadings to the facts. Besides, it does not follow that an objection of variance would have been taken, inasmuch as to make such objection available, it must be proved that the party objecting has been misled. (*Code*, § 169.)

It seems to me, as the case stood when the evidence was sought to be given, it was error to exclude it. Such evidence, it was doubtless expected, would show a right to recover a judgment; and if it had proved sufficient to have enabled the court to give judgment according to the facts stated and proved, such a judgment might have been rendered, "without reference to the form used or the legal conclusions adopted by the pleader." (*Wright agt. Hooker*, 10 N. Y. R. 59.)

But I also think the complaint contained a statement of facts sufficient to constitute a cause of action. The pleading was inartistically drawn, redundant, and in parts irrelevant. It, however, alleged that the plaintiffs were sole agents "for a certain article of commerce known," &c.; that it was their business to receive orders, and to order the goods from the manufacturers; they, in fact, obtaining them and delivering them to the persons giving the orders. Their mode of business was, upon receiving an order, to order from the manufacturers a corresponding quantity for re-sale to the parties giving the order; and that the meaning of the defendants' order was, that the plaintiffs should order the wire and sell the same to the defendants.

These allegations, if proved, would, I think, establish a sale by the plaintiffs to the defendants. The mere styling themselves "agents" did not take from them the character of principals, if they were such in their dealing with the defendants. Persons who have exclusive right to make sales of particular manufactures within certain limits, frequently style themselves "agents," and receive orders, which orders are filled by the manufacturers. But there is no such relation of principal and agent as would authorize the manufac-

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turer to sell in his own name. Such persons stand in the relation of principals to their customers, and can enforce their contracts in their own names. Hence, in this case, if the plaintiffs had been permitted, they might have proved that, upon receiving the defendants' order, they purchased the goods of the manufacturers and paid for them, and had them ready for delivery. Such proof, it seems to me, would have shown a cause of action in their favor against the defendants.

The objection that the acceptance of the order by the plaintiffs was qualified, and that there is no averment that such qualification was agreed to by the defendants, is obviated by the allegation that part of the wire was delivered and accepted by the defendants, after and under such qualification.

But, I think, without pursuing the argument further, that I have shown that the exclusion of the evidence was improper; and for that reason, even assuming that the complaint was defective, the order dismissing the complaint should be reversed, and a new trial ordered, with costs to abide event.

COURT OF APPEALS.

GEORGE G. FREER and others, appellants agt. ABRAM STOTENBUR, respondent.

The owner of land out of possession may maintain an action for an injury to the land, to the inheritance.

A lease of land for agricultural purposes does not give the tenant a right to work a quarry on the land.

If, in an action between a tenant and a trespasser claiming title, the defendant pleads title, and is defeated in the action, he cannot afterwards, in an action between himself and the landlord, litigate the question of title again. The first record is conclusive against him, notwithstanding the parties are different. (*Reversing S. C. 36 Barb. 641.*)

June Term, 1866.

Appeal from an order of the supreme court, at general

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term, granting a new trial on a judgment for plaintiffs at special term, entered on report of a referee. The facts are fully stated in the opinion of the court.

E. H. BENN and JOHN H. REYNOLDS, *for appellants.*

J. MC GUIRE and FRANCIS KERNAN, *for respondent.*

By the court, DAVIES, Ch. J. This action was brought to recover the value of certain stones taken and removed by the defendant, from land owned by the plaintiff's testatrix, Cynthia Ann Freer, the widow and devisee of Samuel Watkins, deceased. The co-plaintiff, John T. Durkee, was the lessee of said premises; but as the action proceeded only for the injury to the reversion, and no claim was made on the trial for the damages to the lessee, he may be regarded as an unnecessary party, and his name can be stricken from the record. (*Code, § 173.*)

The following facts and conclusions of law were found by the referee who tried the action, to wit:

First. That on the 30th day of January, 1839, Samuel Watkins, late of the county of Chemung, deceased, being the owner in fee of certain lands in said county, executed and delivered to the plaintiff, John T. Durkee, and one Asher S. Durkee, an indenture of lease, whereby he demised the same to said Asher S. and John T. for the period of twenty years from the first day of April, 1839; that said premises consisted of about 125 acres of land, which were leased for agricultural purposes, and embraced the locality from which stone were taken by the defendant, as hereinafter stated; that on the 7th day of February, 1846, the said Asher S. Durkee assigned all his interest in said lease, and in the premises, to said John T. Durkee; that on or before the first day of April, 1839, said lessee took possession of the demised premises, and occupied the same until the assignment to said John T. Durkee, and the said John T. has since occupied as such lessee to the time when this action was commenced.

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Second. That said Samuel Watkins died on the 10th day of May, 1851, seized in fee of said premises, and leaving a last will and testament, whereby he devised in fee all his real estate, and bequeathrd all his personal property, to his wife, Cynthia Ann Watkins; that said will was duly proved as a will of real and personal estate, admitted to probate and recorded by the surrogate of Chemung county, on or before the 14th day of October, 1851, and letters testamentary were granted thereon to Hiram Gray, Amasa Dana and Edward Howell, the executors therein named, who took the oath required by law, and entered upon the execution of the trusts created thereby.

Third. That the said Cynthia Ann Watkins intermarried with George G. Freer, about the month of February, 1852; that this action was commenced about the 9th July, 1853, by said Freer and wife, and the plaintiff John T. Durkee; that since the action was commenced the said Cynthia Ann Freer died, leaving a last will and testament, which has been duly proved and admitted to probate; that letters testamentary thereon had been issued to said George G. Freer and Orlando Hurd, the executors named therein, and an order has been made substituting the said executors as plaintiffs in this action.

Fourth. That about the 7th July, 1853, and before the commencement of this action, the said Cynthia Ann Freer, by an instrument in writing, assigned to the plaintiff, John T. Durkee, an equal, undivided half of all claims for stone theretofore taken from said premises, and to all the stone so removed, by whomsoever taken, in which transfer said George G. Freer joined and gave his consent thereto; that on or about the 6th February, 1852, said Hiram Gray and Amasa Dana, two of the executors named in the will of said Watkins, by an instrument in writing duly acknowledged and recorded (in which they recite that they are the only executors who have united in making an inventory, that they have fully executed the trusts created by said will), assigned

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and transferred to said Cynthia Ann Watkins, in consideration of the premises therein recited and of one dollar, all the personal property and estate of the said Samuel Watkins, contained in said inventory, and all other personal property whatsoever belonging to said estate, or to them as executors, and by which they also authorized her to demand and collect in her own name all of the moneys, debts and contracts belonging to said estate, and to them as executors thereof, and which were devised and bequeathed to her.

Fifth. That a portion of said premises so leased as aforesaid were situated within the bounds of the village of Havana, and upon which was a public highway known as Steuben street; that the said Samuel Watkins was also the owner of other lands lying within the bounds of said village, and upon which was a highway known as Mills street; that in the year 1844, the trustees of the corporation of the village of Havana, claiming to act under the charter of said village, assessed the sum of \$530.64 for grading and improving Steuben street, and \$167.04 for grading and improving Mills street, in said village; that all the trustees were not present when said assessments were made; that such assessments not being paid or collected, the trustees aforesaid, claiming to act under the authority of said charter, proceeded to sell the portion of the demised premises situated in said village, for the taxes aforesaid; that such sale was made about the 20th day of March, 1845, and said portion of lands was purchased by Peter Tracy for the term of nine hundred and ninety-nine years; that the said sale was entire, and the trustees executed a deed of conveyance to said Tracy on or about the 31st March, 1845, of that portion which was not redeemed by Dr. Watkins, which deed was duly recorded in the clerk's office of said county; that the lands so sold were bounded upon and by other streets of said village, as well as said Steuben street aforesaid, and was sold for the aggregate amount of assessments and costs; that the said Peter Tracy, claiming to act under and by virtue of said purchase, at

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different times quarried stone from that portion of said premises lying on the west side of the centre of Steuben street, and within the boundaries of said highway, and on or about the 1st day of May, 1848, sold and conveyed to Charles Cook, by a quit claim deed, a portion of premises so purchased by him as aforesaid, embracing the land from which stone were quarried by the defendant, as hereinafter stated; that the defendant, about the month of May, 1848, by the direction and license of said Cook, began quarrying stone upon a portion of said premises, lying in said Steuben street, situated north of where stone were quarried by said Tracy, and that the defendant, down to the commencement of this suit, from time to time, was engaged in taking stone from said quarry; that his excavations extended from two to three rods from the centre of said street, and undermined a portion of the fence on the west side of said street; that the lands from which stone were so taken were open to said street and uninclosed; that no one resided thereon, but the said plaintiff, John T. Durkee, continued to live upon and occupy said premises bounded by the said street, under the lease as aforesaid; that said defendant, between the months of April, 1848, and the 7th July, 1853, took from said premises 3,300 cubic yards of stone, about 2,545 yards of which were removed before the death of said Watkins, and the balance after his death and before the 7th July aforesaid; that said stone in the quarry were of the value of \$412.50; that after they were taken out, and before they were dressed or removed, they were worth the sum of \$826.00, and that after being fitted for the various purposes for which they were furnished by defendant, and by him delivered to the persons receiving the same from him, in and about the village, they were of the value of one dollar per yard; and that stone had been taken from said ledge at various periods for thirty years past, at different points along the same; but Steuben street was not opened and worked until after the lease aforesaid.

Sixth. That on or about the 14th July, 1852, the plaintiff,

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John T. Durkee, recovered a judgment in this court against the defendant for six cents damages and \$115.07 costs, in an action commenced by said Durkee by virtue of his right as the tenant of Dr. Watkins; in which action the defendant justified under the corporation sale and the license from Cook as the grantee of Mr. Tracy, and in which the plaintiff set up and insisted the said sale was null and void, and that said action was for a removal of a portion of the same stone specified in the complaint in this action.

He further found as conclusions of law:

First. That the plaintiffs are the persons who are entitled to recover whatever damages the defendant is liable to pay for the removal and sale of said stone as aforesaid, both before and after the death of said Samuel Watkins.

Second. That by the judgment aforesaid it was determined that said corporation sale was void and did not protect the defendant, and that such adjudication is binding upon the defendant in this action, and that the recovery of six cents damages by said John T. Durkee forms no bar to the actions of the plaintiffs.

Third. That the said sale by the corporation of the village of Havana to Tracy was not in accordance with the requirements of the statute, and vested no title or right in said Tracy, and that said Cook acquired no title by the deed from Tracy, and the defendant was not justified in the removal of said stone by the license he derived from said Cook.

Fourth. That the facts of this case do not show an adverse possession on the part of said Tracy, and those claiming under him, as against the plaintiff in this action.

Fifth. That the plaintiffs are entitled to recover for the stone so removed as aforesaid their value in the quarry, which is the injury to the inheritance, and not their value after their removal and being converted into building material for the purposes of sale, and that the plaintiffs are also entitled to interest upon the said amount from the time of the commencement of this action, to wit., the 7th July, 1853.

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Upon these facts the referee gave judgment for the plaintiffs for the value of the said stone, \$412.50, in all \$629.06, and the judgment thereon was reversed by the general term of the supreme court, and a new trial ordered. The judgment was not reversed on questions of fact.

This court, therefore, is confined, in its examination of this appeal, to the inquiry whether, upon the facts found by the referee, the plaintiffs were entitled to recover; and secondly, whether any errors were committed by the referee in the admission or rejection of evidence, and also whether the motion for a non-suit was properly refused.

The motion for the non-suit was based mainly upon the ground that the stone taken belonged to the tenants or holder of the lease, and not to the owner of the inheritance or reversion. It is clear, if this position be tenable, the plaintiffs could not recover in this action, as it appeared, and was not controverted, that Durkee, the lessee, had recovered nominal damages against this defendant for the damages which he as tenant had sustained.

This action is maintainable under the provisions of the Revised Statutes, which declare that a person seized of an estate in remainder or reversion may maintain an action of waste or trespass for any injury done to the inheritance, notwithstanding any intervening estate for life or years. (3 R. S. 5th ed. p. 39, § 8; *Van Deusen agt. Young*, 29 N. Y. 9; *Schermerhorn agt. Buell*, 4 Denio, 422.)

The reversion has therefore clearly sustained an injury to the value of the stone taken and carried away, unless the position assumed by the defendant be correct, namely, that the stone belonged to the tenant or lessee, in which event no action can be maintained by the reversioner for their conversion. This ground is sought to be maintained upon the finding of the referee that stone had been taken from said ledge, that is, the ledge upon the premises of the reversioner, at various periods for thirty years past, at different points along the same: and the authority of *Saunder's case* (5 Coke, 12), and

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the various cases in which the doctrine there laid down has been affirmed, are invoked as sustaining it.

Assuming, therefore, that this quarry or ledge was open at the date of the lease to Durkee, does it follow, upon the authority of *Saunder's* case, that he was entitled to the stone therein, by virtue of his lease? It is to be observed that the referee has found as a fact that the premises were leased to Durkee for *agricultural purposes*, and this would seem to exclude by the terms of the lease the right to take and quarry stone from the land demised.

In *Saunder's* case, he brought an action of waste against Manwood, assignee of the term in the tenement, for waste done in digging sea coal, and on great deliberation, it was

Resolved, That if a man hath lands, in parts of which there is a coal mine open, and he leases the land to one for life or for years, the lessee may dig in it; for, inasmuch as the mine is open at the time, &c., and he leases all the lands, it shall be maintained that the intent is as general as his lease is, namely, that he shall take the profits of all the land, and, by consequence, of the mine in it.

Now, it is seen that the principle of this case is inapplicable to that now under consideration. No such intendment can arise in this case as was found in that; for here the land was leased for a particular purpose or object, and by the express terms of the lease its enjoyment by the lessee was limited to the defined use, namely, "for agricultural purposes." It cannot, therefore, be intended that, under the lease to Durkee, he should take the profits of all the lands, and of the quarries and mines upon it. His estate and interest were limited and defined, and he took therein only what was necessary for its use and enjoyment for agricultural purposes. And the intendment which the case might raise, when the lease contained no specification or restriction as to the use of the demised premises, is rebutted in this case by the indorsement made on the lease at the time of its execution, and what must be deemed and taken as part thereof,

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namely, the authorization by the lessor that the lessee might get or sell stone off the premises described in the lease, by yielding to the lessor one-half of the stone sold by him.

This position is enforced and illustrated by the case of *Schermerhorn agt. Buell (supra)*. The lease contained a clause in these words: "All the timber in the southeast corner, of about five acres, suitable and proper for fuel, *to be left, and not cleared.*" The lot was wild and uncultivated at the date of the lease. The defendant entered and cultivated most of the land, and on the five acres in the southeast corner of the lot he cut some trees which were suitable and proper for fuel, and carried away the timber.

For that wrong, that action was brought by the plaintiff, the owner of the land, and the lessor. It was held, that the lessor had the right, both of property and possession, in the trees, and that he might sue whenever they were carried away and converted to the use of another.

In the case at bar, the lease being a demise of the land for agricultural purposes only, it did not pass to the lessee the right to take and carry away the stone in the quarry upon the demised premises, although the same had been open anterior to the granting of the lease, and that consequently the property therein remained in the lessor, and the removal thereof was an injury to the inheritance.

As to that portion of the stone taken by defendant before the death of Watkins, the claim of the plaintiffs' testatrix, the right thereto was assigned to Mrs. Freer by the executors of Watkins, and could be rightfully recovered in this action.

The only question, therefore, remaining, is whether the defendant showed any title to the premises from which the stone were taken.

He justifies the taking and conversion of the stone on the ground that he had such title. That title was derived through a sale by the trustees of the village of Havana, to pay an assessment for the grading and improving of Steuben street, in said village, upon which street said premises were

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located. That such assessment not being paid or collected, the trustees, claiming to act under the authority of the charter of said village, proceeded to sell the same to pay said assessment; that at such sale, the premises from which said stone were taken were sold to one Tracy, for the term of nine hundred and ninety-nine years, and a conveyance executed to him therefor, and that he subsequently conveyed the same to one Charles Cook, and that the defendant took said stone with the leave and advice of said Cook.

In the suit commenced by Durkee, the lessee, against the defendant, for the recovery of the value of the same stone, it was adjudged that said sale, and all the proceedings therein, were invalid and void, and conferred no title upon said Cook; and the referee found as a conclusion of law, that, by the judgment aforesaid, it was determined that said corporation sale was void, and did not protect the defendant, and that such adjudication was binding upon the defendant in this action.

This judgment is binding on this defendant upon this question, and he cannot be permitted again to litigate the validity of these proceedings, and of the title acquired by the assessment sale under them. (*Embry agt. Conner and another*, 3 Comst. 511; *White agt. Coatsworth*, 2 Seld. 137; *Castle agt. Myer*, 4 Kern. 329.) These authorities clearly establish the proposition that this defendant cannot again litigate the validity of that sale, and the title of his licensee under it.

The order granting a new trial should be reversed, and judgment on the report of the referee affirmed, with costs

All concur.

Order reversed.

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SUPREME COURT.

ABRAHAM COVERT agt. MULFORD GRAY.

In an action on the case, to recover damages for the act of the defendant in enticing the plaintiff's son away from the service of the plaintiff, without the knowledge or consent of the latter, and inducing him to enlist in the army for three years, as a substitute for the defendant, who had been drafted for such service, the rule of damages is, that the plaintiff can only recover for the loss of service up to the time of the commencement of the action, or at most, to the time of the trial.

In such an action, the law does not allow *punitive* or *exemplary damages*. The foundation of the action is the *loss of service*, and the recovery should be the damage sustained. (BALCOM, J., dissenting on both points. See his opinion.)

Broome General Term. Argued July Term, 1865; decided January Term, 1866.

PARKER, MASON and BALCOM, Justices.

This was an action to recover damages for the act of the defendant in enticing the plaintiff's son, Nathaniel, away from the service of the plaintiff, and inducing him to go into the army of the United States for the term of three years, as a substitute for the defendant, who had been drafted for such service.

The plaintiff's son was seventeen years old when he entered the army as a substitute for the defendant, in September, 1863. The name of the plaintiff was forged to a consent that his son might enlist in the army. He had previously consented that three other sons might serve in the army, and they had gone into the Union army as volunteers; but he did not give his consent to Nathaniel going, and did not know he was going until he had entered the service as a substitute for the defendant. The defendant paid Nathaniel \$200 for enlisting in the army as his substitute.

The action was tried at the Schuyler circuit, in December, 1864, when the jury rendered a verdict in favor of the plaintiff for \$250 damages. Judgment was suspended, and the defendant moved for a new trial on a case and exceptions.

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JOHN J. VAN ALLEN, for plaintiff.

I. The plaintiff being entitled to the services of Nathaniel, his minor son, by reason of the relation existing between them as parent and child, has the right to maintain this action for the damages sustained by him, by reason of his rights having been invaded.

Whenever a servant is enticed from his master's service, the master is entitled to his action of trespass on the case with a *per quod*.

If a servant be taken away from his service, his remedy is trespass *vi et armis* with a *per quod*.

If he go away from his master's service, and be retained by another, who knows the fact of his having left his master, such person so retaining is liable to the master in an action on the case. (*Reeves' Dom. Rel.* 375; *Ld. Ray*, 1116; *Salk.* 38; *Cowp.* 56; *3 Salk.* 391; *2 East.* 8, 13; *Esp.* 645; *Lewerd* agt. *Basely*, 1 *Ld. Ray*, 62; 1 *Salk. R.* 407; *Dubois* agt. *Allen, Anthon*, 94; *Philips* agt. *Squier, Peake's Nisi Prius*, 82.)

II. There was no error in the rulings of the judge, upon the trial of the cause, in receiving improper testimony.

The objection of the plaintiff's counsel to the defendant proving that the boy had previously or subsequently said to a stranger (and not to either of the parties), he desired to go to the army and was bound to go, was properly sustained. His declarations were not, and could not be, used to prejudice us in the recovery of the loss we had sustained. It was not proposed to be proved that the plaintiff proposed to emancipate him, or to relinquish any right he might have to his services.

This kind of action materially differs from that brought by a husband for harboring his wife. In such case, it is a good defense to prove that she is so kept from motives of humanity to secure her from the ill treatment of her husband.

In a case like this such defense could not prevail, the

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action being founded solely on the loss of services. (*Peake's Nisi Prius*, 82.)

In no aspect of the case could this evidence be material. As the boy was under the control of his father, and his services belonged to him, therefore the son had no legal right to go into the army without the consent of his father, and thus deprive him of this right to his services. (*James agt. Le Roy*, 6 Johns. R. 247.)

III. The court properly refused to charge the jury as requested by the defendant's counsel.

The court had properly charged the jury previously, in respect to all the subjects contained in the requests of the counsel; therefore, if the counsel was dissatisfied with the charge as made, he should have specially excepted. The court was under no obligation to repeat his charge to the jury; and if any error was committed, it is now too late to except, and the right of exception on the part of the defendant is lost.

The only exception to the charge will be found at folio 144. The court expressly charged the jury, that the question of damages was for them to determine, and they were not to give exemplary damages unless the defendant acted in bad faith.

If the jury found that the defendant had by means of covine and fraud enticed the son of the plaintiff away beyond his reach and control, as we allege, and most clearly proved he did, then we most certainly had the right to exemplary damages.

Cowen, in his treatise (4th ed. § 1527), says; "In actions for a wrong, the damages may in some cases exceed the naked injury sustained by the plaintiff. In these cases they are called *vindictive* or exemplary damages, being given as an indemnity to the plaintiff for his time and expenses in seeking his remedy, as well as a compensation for his injury. The actions in which they are warranted are confined to cases where the conduct of the defendant has been willful, malicious

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or cruel, or of evil example. Thus, in an action for enticing away the plaintiff's indented servant, the rule is to give as damages the value of the services of the servant while in the defendant's employment; and in aggravated cases the jury may give the whole value of his services during the time for which he was indebted." (*Athon's Nisi Prius*, 94; 4 *Moore*, 12; *Tillotson* agt. *Cheetham*, 3 *Johns. R.* 56; *Cook* agt. *Ellis*, 6 *Hill*, 466; *West* agt. *Jenkins*, 14 *Johns. R.* 352.)

The defendant most certainly had no reason to complain of the charge of the judge in respect to the question of damages. In determining the question of the value of the son's services, we insist that in justice to the plaintiff, his honor the judge should not have instructed the jury that in determining the value of the services they were to consider the price he was earning when at service before going into the army. He should have instructed them to fix as a basis the price substitutes for drafted men were worth, and this should have formed the basis of the estimate for the services, as the plaintiff was entitled to recover their value, and such services, like an article of merchandise, were worth the price being paid therefor.

The charge, we insist, was more favorable to the defendant than the plaintiff, and, inasmuch as the defendant is in no wise prejudiced, we insist that the motion for a new trial should be denied, and judgment ordered for plaintiff on the verdict.

J. McGuire, for defendant.

By the court, MASON, J. The judge at circuit, in my judgment, committed two errors in giving the rule of damages to the jury. In the first place, he charged the jury that, if the plaintiff was entitled to recover, their verdict should be the value of the services of his son for the full term of three years, if living, and advised them that they would probably find he was living; and to this the defendant's counsel

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excepted, and requested him to charge the converse. This proposition cannot be sustained. The plaintiff's son enlisted in September, 1863, and this suit was commenced in the spring of 1864, and the cause was tried in December, 1864. The case of *Hambleton* agt. *Veere* (2 *Saund. R.* 169), holds that in this action for enticing away the plaintiff's servant, that he can only recover for the loss of service up to the time of the commencement of the suit. The case was most ably argued, and the King's bench, *tota curia*, as the report shows, gave deliberate judgment, holding that the plaintiff could only recover for the loss of service up to the time of the commencement of the action; setting aside the verdict, because damages had been for the whole residue of the term. Three reasons were assigned against allowing the damages for the unexpired term. The first was, that the apprentice might return to his master, and so the plaintiff have the benefit of his services; secondly, the master might compel his return; and, third, that the apprentice might die during the term, and the plaintiff could not then recover, because the death happened by the act of God. This case has never been overruled, but was approved by LITTLEDALE, Justice, so late as 1840, in pronouncing the opinion of the court in *Hadsell* agt. *Stallebross* (11 *Adol. & Ellis*, 361; 3 *Eng. Com. Law.* 94, 96).

I have not been able to find, after the most careful examination, that the case of *Hambleton* agt. *Veere* has ever been overruled or questioned, so far as the general rule there laid down is concerned.

The rule is laid down in *Dubois* agt. *Allen* (*Anthon's Nisi Prius*, 94), that, in an action on the case for enticing away the plaintiff's servant, the general rule of damages is the value of the service during the time the servant has been in the defendant's employ.

I know there are cases, where the action is brought to recover for the loss of service resulting from assault and battery, or personal injury, committed upon the servant, that the courts have allowed a recovery for the full unexpired

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term, but they are cases where the proof showed the injury was permanent. Those cases have no application to the case at bar, for the servants were actually shown to be disabled.

It may be said that the case under consideration is not like ordinary cases of this kind, for enticing away a servant, for the reason that the defendant caused or procured the plaintiff's son to enlist in the army, and he is bound to military service, and cannot act his free volition in regard to returning. This argument is good for what it is worth. There are very many probable contingencies upon which he may be discharged before the end of three years. He may become sick, and the government discharge him; he may be disabled by wounds to serve in the army, and be discharged. His enlistment was clearly illegal, being procured upon a forged written consent of his father. It became, therefore, the duty of the secretary of war, under the act of congress and articles of war, to discharge him, on his father's making proof of this fact. The plaintiff, therefore, might procure his discharge.

There is still another answer. The enlistment was to end with the war, and the law will not presume in such a case that the war will continue three years. The law presumes that a fact continuous in its character still continues to exist, until a change is shown, as that a life still continues, or that a partnership proved to exist still continues (*1 Cow. & Hill's Notes*, 295); and so a state of war proved to exist three years ago is presumed in law to be still existing, unless the contrary be shown, but the law indulges no presumption at the present time that it will continue three longer. On the contrary, war is not the normal, but an exceptional state of society, and is generally regarded as a thing not to be desired either by individuals or nations. Peace is desirable, and not war, and the presumption is that men and nations will do that which is for their interests, and act with reference to them. The law, however, will not indulge in any presumption in regard to a future condition of war or peace. God alone knows what the future has in store for nations, and

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finite courts, whose visions cannot penetrate the future, should not speculate as to its probabilities, much less attempt to solve them and make them the basis of their judgment.

The rule is reasonable which presumes the continuance of an existing fact at the time of the trial, for the other party can overthrow it by proof if it be not so; but when it presumes a future continuance, the party has no ability to unfold the future and give an answer by his proof. The only safe rule, in cases of this kind, is to limit the loss of service up to the commencement of the suit, as was done in *Hambleton agt. Veere*, or, at the furthest, up to the time of the trial.

The judge left it to the jury to say whether, from the evidence, the plaintiff's son was dead or not, and then in this connection charged the jury that, if they should find that he is dead, and that the defendant enticed him into the army when he knew he had no right to do so, that they might award such vindictive damages to the plaintiff as they should think would be right for the punishment of the defendant, and as a compensation of the time and trouble of the plaintiff in prosecuting this action; and this was excepted to by the defendant's counsel. This portion of the charge certainly is erroneous. It is well settled that the master cannot recover in an action, even for the loss of service, where the defendant has beaten his servant to death. (*Higgins agt. Butcher, Yelv. 39, 90; 1 Browl. 205; Ney. 18; Ld. Raym. 259; 12 Petersdorf Abr. 406, 594, note; 15 N. Y. R. 432; 23 N. Y. R. 478; Reeves' Dom. Rel. 376, 377.*) The rule is also well settled that in trespass, for an assault upon the child or servant of the plaintiff, *per quod servitum amisit*, the measure of damages is the actual loss which the plaintiff has sustained, and that exemplary damages cannot be given, although the assault be of an indecent character upon a female, and under circumstances of great aggravation. (4 Den. R. 461; 24 W. R. 429.) Now, if the law will not give to the parent exemplary or vindictive damages, against a person who insultingly assaults and beats, with great circumstances of aggravation, his

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daughter, but confines him simply to his claim for loss of services, I can see no reason why it should give him exemplary damages simply for enticing him away from his service and placing him in circumstances where there is simply a possibility he may be injured or killed by others. And as the rule is well settled that the master or parent cannot sustain an action at all for loss of service, against one who kills his servant outright, it cannot be guilty of the inconsistency of punishing the party with exemplary damages, simply that he induces the servant to place himself in circumstances where his life is simply in danger, and in consequence of which he loses his life.

This is not a case where the law allows punitive or exemplary damages. The foundation of the action is the loss of service, and the recovery should be the damage sustained. The guilt and moral turpitude is greater to commit a gross and inhuman assault and battery upon a servant, and thus disable him, or to commit an indecent assault and battery upon a female, than is the conduct of the defendant in this case, who simply paid the plaintiff's son \$200 to induce him to go into the army as a substitute for him, after being informed that the young man desired to enlist and go for a bounty from some one. The act, to be sure, is an illegal and wrongful act, as regards the father, unless his consent is obtained; that obtained, and there is no wrong in it.

The services to be rendered are respectable and honorable, and if rendered in defense of his government and his country, are commendable, and the only thing about it is the legal wrong of depriving the father of the services of his child. This, I mean, is all, so far as the plaintiff is concerned. He cannot have his wounded feelings solaced by any award of damages at the hands of the jury. (*Cowden agt. Wright*, 24 W. R. 429.) Now why should the plaintiff be entitled to exemplary damages of the defendant, if his son is killed? I know of no other reason only as a *solacium* to his wounded feelings. The defendant has done precisely the same wrong,

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whether the plaintiff's son is killed in battle or survives to return to his friends.

The case of *Gunter agt. Astor and others* (4 J. B. Moore's R. 12; 15 Eng. Com. Law R. 357), is relied on as holding a different rule, and as justifying the charge of the judge in the case at bar. The head note of the case declares that, "in an "action on the case for enticing away the plaintiff's servants, "the measure of damages is not to be ascertained at the "actual loss he sustained at the time, but for the injury done "him by causing them to leave his employment." The case was a peculiar one, and attended with circumstances of great aggravation. The plaintiff was a manufacturer of piano fortés, and the defendants conspired together to entice away the plaintiff's servants and employees in a body. They invited the plaintiff's servants to a dinner and got them drunk, offered them higher wages and induced them to sign an agreement to leave the plaintiff's service and go into their service, and they all left the plaintiff accordingly; by which the plaintiff's business was broken up, and he nearly, if not absolutely ruined. And the judge left it to the jury to ascertain what damages the plaintiff had sustained by the misconduct of the defendants, and the jury found a verdict for the plaintiff for £1600; and the court sustained the verdict and denied a new trial. The complaint charged the defendants with a conspiracy, and the jury so found from the evidence. The case rests upon its own peculiar circumstances, and is no authority as controlling the rule of damages in the action generally, or in a case like the present, where the plaintiff's son, while working away from home, went and sought the defendant and offered to go as a substitute for him, learning that he wished to procure one. And the case seems to have been sustained upon the ground that the jury found that the plaintiff had actually sustained that amount of damages. Be that as it may, it can hardly be regarded as an authority overruling a rule of damages so long established as has been the rule, in this action especially. No reference is made in the decision

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to the prior adjudged cases. The case, to say the least, is of questionable authority, as the servants were not bound to the plaintiff for any time of service, but were only to work by the piece. If the verdict can be sustained at all, it must be on the ground of fraud and conspiracy alone.

I am of opinion the charge of the judge was wrong in both respects, and that a new trial should be granted.

PARKER, J., concurred.

BALCOM, J. (*dissenting.*) This case was tried, as too many are, by counsel without briefs, or very meagre ones.

The plaintiff can have only one action against the defendant for enticing away his son from his service. If he had recovered in this action only for the loss of his son's services to the time he commenced it, he could not maintain another action against the defendant for the loss of his son's services since that time, for the reason that he could not have two actions for the same cause, *i. e.*, for enticing away his son from his service by the defendant, in September, 1863. (See *Fetter agt. Beal*, 1 *Lord Raym. R.* 339; *S. C. 1 Salk.* 11; *Sedgwick on Damages*, 3d ed. 106; *Secor agt. Sturgis*, 16 *N. Y. R.* 554.)

Was the plaintiff entitled to recover damages for the loss of his son's services subsequent to the commencement of the action? And what is the true rule of damages in the case?

The court of king's bench held, in *Hambleton agt. Veere* (2 *Saund. R.* 196; *S. C. 2 K. B.* 693; *Ld. Raym.* 200; 1 *Lev.* 299), that the plaintiff could only recover for the loss of the services of his apprentice, who had been enticed away by the defendant, to the time of the commencement of the action, and arrested the judgment, because it did not appear but the jury had given damages for the term the apprentice was bound to the plaintiff, which had not expired. That case was decided in the reign of Charles the Second.

All that was decided, in *Dixon agt. Bell* (1 *Starkie*, 287), respecting the damages the plaintiff could recover for the

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negligence of the defendant, by which the plaintiff's son was wounded, was that the plaintiff could recover the surgeon's bill for attending his son, "since the surgeon could compel the payment of it as a legal debt;" but that he could not recover the physician's fees, "since they had not been actually paid; and he could not enforce the payment by action."

The head note to *Gunter agt. Astor and others* (4 J. B. Moore's R. 12), is: "In an action on the case for enticing away the plaintiff's servants, the measure of damages is not to be ascertained at the actual loss he sustained at the time, but for the injury done him by causing them to leave his employment." Lord Chief Justice DALLAS said - "I left it to the jury to give damages commensurate with the injury the plaintiff had sustained. The defendants clandestinely sent for his workmen, and, having caused them to be intoxicated, induced them to sign an agreement to leave him and come to them; by which the plaintiff was nearly, if not absolutely, ruined. I am by no means dissatisfied with the verdict the jury have found (which was £1600), as the conduct of the defendants, in point of fact, amounted to an absolute conspiracy, and I therefore think the court cannot now be called on to interfere by granting a new trial." Mr. Justice PARK said: "The misconduct of the defendants in this case appears to have been most gross. It has been said the plaintiff has only sustained damage for the value of the half day's labor of his workmen, when they visited the defendants; but it is not for the court to ascertain the precise damages he is entitled to, as that was most properly left by my lord chief justice to the jury." Mr. Justice RICHARDSON said: "This was an action for seducing and enticing away the plaintiff's servants. The measure of damages he is entitled to receive from the defendants is not necessarily to be confined to those servants he might have in his employ at the time they were so enticed, or for that part of the day on which they absented themselves from his service, but he is entitled to recover damages for the loss he sustained by their

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leaving him at that critical period. It appears, too, that the defendants combined to allure them from his service, and I do not think the court ought now to infer that two year's profit is too much for the plaintiff to recover." A new trial was refused in that case, and it was decided in 1819.

The case of *Dubois agt. Allen* (*Anthon's Nisi Prius R.* 128) was tried before Mr. Justice VAN NESS, at the New York circuit, in 1809, and it was an action on the case for enticing the plaintiff's indented servant from his service. The defendant's counsel cited *Hambleton agt. Veere (supra)*, and contended that the correct rule of damages was the value of the servant's services during the time she was in the employ of the defendant. But VAN NESS, J., said: "The value of the service during the time the servant has been in the employ of the defendant is the general rule; but the jury may, in certain aggravated cases, give the whole value of the servant by way of damages. The testimony, therefore, is admissible, to enable the jury to exercise that discretion. After ill blood has been created between a master and servant, by the meddling of a third person, the servant ceases to be of any value to the master."

Judge COWEN uses the following language, in that part of his *Treatise* where he speaks of damages in an action for a wrong, to wit: "In an action of trespass, where the conduct of the defendant has been willful, malicious or cruel, exemplary damages, or smart money, is also frequently given, by way of punishment to the defendant, and a liberal indemnity to the plaintiff for his time and expense in seeking his remedy, as well as his damages, properly so called; and an exercise of this discretion is, many times, highly salutary and necessary. Accordingly, in an action for enticing away the plaintiff's indented servant, the general rule is, to give damages for the value of the service during the time of the servant's employ with the defendant; but the jury may, in aggravated cases, give the whole value of the servant in

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damages, for the whole time during which he is indentured." (*2 Cow. Tr. 2d ed.* 1007.)

In an action for an assault and battery, the plaintiff may recover for damages accruing after the commencement of the suit, provided they are the direct and natural consequences of the battery. (*Birchard agt. Booth*, 4 *Wis. R.* 67; *also see Fetter agt. Beal, supra.*)

In an action of tort for wounding the plaintiff's servant, whereby he was disabled from serving, the jury may give damages for the loss of the service, not only before action brought, but afterwards, down to a time when, as it appears in evidence, the disability may be expected to cease. (*Hodson agt. Stallebross et al.* 11 *Adolph. & Ellis*, 301; *S. C. 9 Car. & Payne*; 63; *Smith's Master and Servant*, 85.)

"In estimating the pecuniary loss, where the plaintiff receives a personal injury by the negligence of the defendants, all the consequences of the injury, future as well as past, are to be taken into consideration." (*Curtis agt. R. and S. R. R. Co.* 11 *N. Y. R.* 534.)

The plaintiff may recover exemplary damages against a man who seduces his female servant and gets her with child. (*See Ingersoll agt. Jones*, 5 *Barb.* 661; *Lipe agt. Eisenlerd*, 32 *N. Y. R.* 229.) But in trespass for an assault and battery upon the child or servant of the plaintiff, the measure of damages is the actual loss which the plaintiff has sustained, and exemplary damages cannot be given, though the assault be of an indecent character upon a female, and under circumstances of great aggravation, for the reason that the child or servant can maintain an action for the assault and battery, "in which the measure of redress depends very much upon the sound discretion of the jury." (*Whitney agt. Hitchcock*, 4 *Denio*, 461; *Cowen agt. Wright*, 24 *Wend* 429.)

The plaintiff's son could not maintain an action against the defendant for being enticed away from his father's service by the defendant; and I am unable to see why the plaintiff is not entitled, upon principle, to recover exemplary damages

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of the defendant for intentionally and wrongfully depriving him of the services of his son, by inducing him to go into the army as his substitute.

Whether I erred in charging the jury, if the plaintiff's son was killed in battle, the plaintiff could not recover for the loss of his son's services subsequent to his death, is a question not properly before the court on this motion for a new trial. The plaintiff only could complain of that instruction. But upon this question see *Ford agt. Munroe* (20 Wend. 210), *Green agt. The Hudson River Railroad Company* (28 Barb. 9), *Peck agt. The Mayor, &c., of New York* (3 Comst. 489), and *Gilligan agt. The New York and New Haven Railroad Company* (1 E. D. Smith's R. 453).

The plaintiff's son enlisted in the army for three years, and there was no presumption at the time of the trial that the government would not want his services, if alive, during that period, which would end a little short of two years from the date of the trial. It seems to me the most natural presumption at that time was that the government would hold him for the residue of the term of three years for which he enlisted; and I am of the opinion it would have been improper for me to have allowed the jury to find the government would sooner discharge him. I think it was just and reasonable to hold the defendant to the presumption that the plaintiff's son would live and serve as his substitute in the army the whole time for which he placed him there.

The plaintiff's complaint contained sufficient allegations to entitle him to recover all the damages he had sustained at the time of the trial, and would thereafter sustain, by reason of the wrongful conduct of the defendant in enticing his son away from his service; and I am satisfied the plaintiff should not be restricted in his recovery to damages for the loss of the services of his son prior to the commencement of the action, or to the time of the trial, and that the jury were properly instructed that they might, in their discretion, give exemplary damages, by way of punishment to the defendant,

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and to compensate the plaintiff for time and trouble in prosecuting the action.

I think the case of *Hambleton* agt. *Veere* (*supra*) should not be followed, so far as it conflicts with these conclusions. It seems to me that case is not sustainable upon principle; and it is too much in conflict with the spirit of decisions since made to control the rule of damages in this action.

It will hardly do to allow persons who wrongfully entice children away from the service of their parents, to get off, in all cases, by simply paying the actual pecuniary damages sustained by the parents for the loss of the services of their children. The pecuniary loss in cases is sometimes very small, when the parents' grief is overwhelming. The best interests of society require that the jury should be permitted to punish persons, in proper cases, with exemplary damages, who wrongfully interfere with the rights of parents and masters, in respect to the services and care of their children and servants. Parents and masters should have a remedy commensurate with the wrong that is done them, and sufficient to prevent them from resorting to personal violence upon those who thus interfere with their rights, and to deter lawless and evil disposed persons from committing such wrongs.

For these reasons, I am of the opinion I committed no error on the trial of this action to the prejudice of the defendant, and that his motion for a new trial should be denied, with costs.*

* NOTE.—Since the decision of this case, I have discovered that my views respecting the rule of damages in it are sustained by the supreme courts of Massachusetts and New Jersey. See *Stone* agt. *Heywood* (7 *Allen*, 118), *Mages* agt. *Holland* (3 *Dutcher*, 86).

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SUPREME COURT.

WILLIAM J. LAWTON and others agt. WILLIAM S. REIL and others.

The Code only requires, in order for the issuing of an attachment against non-resident debtors, that the action should be for the recovery of money, that the same should be on contract, that the plaintiff should specify the amount of the claim and the grounds of the demand.

The cases which have been decided, as to the form of the summons, should not be considered as controlling in regard to the issuing of attachment.

It is not necessary that the affidavit upon which a warrant of attachment is issued should show the issuing of the summons; it is enough if the summons was issued when the attachment is obtained.

The attachment is not void for omitting to state "that it was issued in an action then pending."

New York General Term, February, 1868.

Present, BARNARD, INGRAHAM and SUTHERLAND, Justices.

THE defendants appeal from an order denying motion to vacate attachment.

H. C. VAN VORST, *for appellants.*

WILLIAM BLOOMFIELD, *for respondents.*

INGRAHAM, J. The attachment was issued against the defendants as non-resident debtors. The claim of the plaintiffs was for damages arising upon the breach of a contract on part of defendants to purchase for the plaintiffs sound corn; and the breach complained of was that the corn was not sound, but heated and spoiled.

The damages claimed was the difference between the cost price and the price at which the plaintiffs sold the same.

The first ground relied upon is that the damages are unliquidated, and that in such a case the Code does not provide for an attachment. The only requisites in the Code are that the action should be for the recovery of money, that the same should be on contract, that the plaintiff should specify the amount of the claim and the grounds of the demand, and

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that the defendant should be a non-resident debtor. All these facts are contained in the affidavit. The claim arises on contract, and the amount claimed is a fixed amount, being the difference between the amount paid and the amount at which it was sold. It is not necessary here to decide whether, if the damages were really unliquidated and not ascertained in any way, an attachment could issue. Here everything requisite is stated, and the damages also are ascertained, if the plaintiffs are entitled to recover at all. There is a fixed sum ascertained by the sales, and that sum is claimed by the plaintiffs. The case of *Ward agt. Begg* (18 Barb. 139) is a general term decision in this district, and has not, that I know of, been reversed.

I do not think the cases which have been decided, as to the form of the summons, should be considered as controlling in regard to the issuing of attachments. If so, non-resident debtors cannot be proceeded against here for the violation of contracts, even although they may have large amounts of property within the jurisdiction of the court.

The affidavit is not on information and belief; it states facts, most, if not all, of which are stated as within the knowledge of the party making it.

That portion which states the defendants have property in the state, on information and belief, is not necessary to the issuing of an attachment, and might have been omitted.

It is not necessary that the affidavit should show the issuing of the summons; it is sufficient if the summons was issued when the attachment is obtained. This is evidenced by the summons which accompanies the attachment; and if both are delivered together to the sheriff, it is sufficient. The issuing of the summons applies rather to the time of having the property attached than to the application of the judge. The warrant states the existence of the cause of action, but does not state that it is an action then pending. I do not know why the warrant was altered as it appears to have been, but still enough remains to comply with the requisites

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of the statute. If the facts are sufficient, the warrant is not void for omitting to state one of them.

The only objection of force is that the affidavit was sworn to before a commissioner in Kentucky, but no certificate of the secretary of state has been obtained, as required by the statute. That act (*Sept. 1850, ch. 270, 4th ed.*) requires that, before any such affidavit shall be entitled to be used, the certificate shall be annexed. Here it has been used by the judge, and although the objection might have been then made, still I do not think it fatal. The omission may be amended and supplied.

Unless the plaintiffs cause the certificate to be annexed to the original affidavit within ten days after notice of this decision, the order will be reversed. If so annexed, the order is affirmed, without costs.

The plaintiffs may take the original affidavit from the files for this purpose, and must retitle the same, duly certified, within that time.

BARNARD, J., concurs.

SUTHERLAND, J., dissents.

SUPREME COURT.

ALONZO F. DENNIS, respondent agt. ALEXANDER SNELL,
appellant.

An application for leave to amend a *pleading* on the trial is always addressed to the discretion of the court, and, if denied, is not the subject of appeal or review.

In an action against a *sheriff*, for *taking and converting* the property of the plaintiff, it is not necessary to aver in the complaint that the property taken was *exempt from execution*.

The proof of such fact on the trial can only become necessary to meet a defense, and can then be given in evidence without being pleaded.

Where, however, the complaint contains an averment that the property is exempt from execution, the defendant is not compelled to set up in his answer the *non-exemption of the property*, or be excluded from proving it on the trial, merely because

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it is averred in the complaint. It is an immaterial allegation, which it is not necessary to deny.

If the sheriff relies entirely upon the *execution* in taking property, it is sufficient for him merely to set forth the writ; but if he desires to go beyond the execution, and inquire into the *consideration of the judgment* upon which the execution is issued, he must plead the *judgment*, and set it forth in his answer.

Fourth District General Term, Canton, October, 1866.

Present, BOCKES, ROSEKRANS, POTTER and JAMES, Justices.

THIS was an action against the defendant, as sheriff, for taking and selling property on execution alleged to be exempt.

The complaint averred that defendant was sheriff of Montgomery county; that in May, 1864, by his deputy, he took away and converted certain property of the plaintiff, of the value of \$232; that plaintiff was a householder, had a family for which he provided, and that said property was his team, used in their support.

The answer, after denying most of the allegations of the complaint, for further answer justified the taking by virtue of an execution issued to defendant, as sheriff, out of the clerk's office of Montgomery county, commanding him to collect of the goods and chattels of Alonzo F. Dennis and another \$60.84, which Joseph Platner recovered against them for damages and costs, on the second day of May, 1863, before Charles McLean, a justice of the peace of the county of Otsego, a transcript of which was duly filed and judgment docketed in the clerk's office of Montgomery county, April 1st, 1863 (as it is stated in said execution); and if sufficient goods, &c. That said defendant was sheriff of said county of Montgomery; that said property was duly sold, &c.

On the trial, the plaintiff proved that defendant was sheriff; that one La Rue was his deputy; that La Rue, by virtue of an execution as set forth in the answer, levied upon one bay horse, one bay mare, one double harness and one double lumber wagon, the property of plaintiff, and sold the same; that their value was \$225; that at the time plaintiff was a householder, and had a family for which he provided; that

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this was his team, used in his support; that he had no other property except some household furniture, worth about \$50; and that plaintiff forbid the sale and claimed the property as exempt.

Defendant thereupon offered to prove that the execution in question "was issued upon a judgment rendered upon a note which was given for another horse, which was the plaintiff's exempt team." The plaintiff objected to this proof, on the ground that it was inadmissible under the pleadings as evidence, and that defendant had not set up any such matter as a defense in the answer. The court sustained the objection, and defendant excepted.

The defendant then asked leave to amend his answer, to which the plaintiff's counsel objected; and the court declined to allow the amendment, and defendant excepted.

When the plaintiff rested, the defendant moved for a nonsuit, on the following grounds:

"1st. That plaintiff has not shown by the proofs that the property taken and sold was exempt property; nor did it appear from the pleadings.

"2d. If he has shown the property exempt, then the seizure thereof upon the execution was without the command of the process, and the defendant is not liable."

The court denied the motion, and defendant excepted.

The defendant then offered to prove the judgment upon which the execution in evidence was issued, and to show that it was rendered for another horse, which was exempt. This was objected to, on the ground that no judgment had been set up in the answer, and no allegation that it was for the purchase price of exempt property. The court sustained the objection, and defendant excepted.

The court submitted the question of value to the jury, and upon their finding directed a verdict for the amount for plaintiff.

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SMITH & COUNTRYMAN, *for plaintiff.*
A. H. AYRES, *for defendant.*

By the court, JAMES, J. The motion for a non-suit was properly denied. It was made clearly to appear that the property which the defendant took and sold was exempt from levy and sale on execution. I cannot find anything in the case on which to sustain the other ground for non-suit. If it was based on the idea that the execution contained a direction excepting exempt property from its operation, that fact should have appeared in the case, either by statement, or a copy of the writ set forth, in order to raise the point on appeal. In the absence of all evidence of such exception, the court cannot assume that the writ contained such a direction, although that may be the usual form. Therefore the point cannot be considered.

An application for leave to amend a pleading on the trial is always addressed to the discretion of the court, and, if denied, is not the subject of appeal or review. (*Phincke agt. Vaughan*, 12 Barb. 215; *New York Marble Iron Works agt. Smith*, 4 Duer, 362; *Hendricks agt. Durkee*, 35 Barb. 298.)

The complaint in this case set forth the whole grounds of the plaintiff's cause of action, viz., that defendant was sheriff, La Rue his deputy, the taking and conversion of property under and by virtue of an execution against him, and that such property was exempt. It set forth more than was necessary. The cause of action was complete without any statement of the reason or authority for taking the property, and its exemption. (*Butler agt. Mason*, 16 How. 546.) Such allegations were not part of the gist of the cause of action, and were not necessary to be proved in the first instance to entitle the plaintiff to recover. (*Bedel agt. Cool*, 33 N. Y. R. 581; *Esselstyen agt. Weeks*, 2 Kern. 635; *Sands agt. St. John*, 36 Barb. 28, 31.)

The proof of such facts could only become necessary to

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meet a defense, and could then be given in evidence without having been pleaded. (*Esselstyen* agt. *Weeks, supra.*)

Therefore the averment of these facts in the complaint did not impose upon the defendant the necessity of averring in his answer any facts other than such as were necessary to answer the material allegations of the complaint. In other words, the defendant was not compelled to set up in his answer the non-exemption of the property sued for, or be excluded from proving it on the trial, merely because the plaintiff averred its exemption in the complaint. The Code only requires the complaint to contain a plain and concise statement of the facts constituting the cause of action, in this case, that the defendant, by his deputy, took and converted his property and its value. The answer only required a general or specific denial of each material allegation, or the statement of new matter constituting a defense or counter-claim. In this case, the real defense was new matter, a justification under a judgment and execution. But, as the defendant was an officer, if he relied entirely upon the execution, and nothing beyond it, it was sufficient for him in such case merely to set forth the writ; but if he desired to go further, or it became necessary to inquire into the consideration of the judgment, it would be necessary to plead such judgment and to set it forth in his answer; and having averred the existence of a judgment, he would be at liberty to prove it, and would then be at liberty to show its consideration, without having averred it, if material to answer any fact proved by the plaintiff.

The theory of such a trial is this: The plaintiff having averred the tortious taking of his property by defendant, proves the act and the damages, and rests. The defendant having set up that he took it as an officer, by virtue of an execution against the plaintiff's goods and chattels, proves such execution, and rests. The plaintiff then, as he may, without averment, because the Code allows no reply to new matter constituting a defense in an answer, prove that he is

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a householder with a family, and that the property taken was his team. That would take the property without the execution. Then, before the defendant can be permitted to overcome this, by proof of the consideration of the judgment, he must first establish his judgment. The existence of the judgment was new matter, and required to be pleaded. If the property in controversy had not been exempt property, an execution fair on its face would protect the officer, even though there was no legal judgment to back it, and therefore the existence of a judgment for that purpose need not be averred.

This is merely for the personal protection of the officer executing process; but when the officer sees fit to go beyond the power of the process, or for any other reason, when sued, it becomes necessary for him to prove a judgment, he, no more than any other party, can do so, without having pleaded its existence in the answer.

Therefore, for the reason that the judgment on which the execution was issued was not set up in the answer, the judge at circuit was right in refusing to allow the defendant to show its consideration as a defense to plaintiff's claim of exemption from levy and sale on execution of the property in suit.

Judgment affirmed.

N. Y. SUPERIOR COURT.

CHARLES DEXHEIMER, administrator, plaintiff and respondent
agt. CONRAD GAUTIER, defendant and appellant.

A delivery as a free and voluntary gift of money by a soldier, at or about the time of his enlistment into the army, constituting a portion of his bounty money, to a

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friend, with directions to keep the same as a gift, in case of his decease, does not constitute it a *donatio mortis causa*. (BARBOUR, J., dissenting.)

General Term, January, 1867.

ROBERTSON, Ch. J., and S. B. GARVIN and J. M. BARBOUR,
Justices.

APPEAL by the defendant from a judgment for plaintiff at special term.

STALLKNECHT & HALL, for defendant, appellant.

JOHN J. FREEDMAN, for plaintiff, respondent.

I. The defendant and appellant, at the trial, waiving all other points, proposed to rest his defense exclusively upon the ground that the gift set up in the answer was a *donatio mortis causa*; but his offer of proof was insufficient, in not showing that the gift was made by the donor:

1. In peril of death *at the time* it was made; and
2. With relation to his decease by *illness* affecting him *at the time of the gift*; and
3. That it was conditioned to take effect on the death of the donor by his *disorder then existing*.

These are essential to constitute a *donatio mortis causa*, and unless they all concur, there is no valid gift. (*Dayton on Surrog.* 3d. ed. pp. 262 and 263, and cases there cited.)

Courts do not uphold such gifts unless they are attended by all the requisites which the law requires. The policy of the law is against the encouragement of such gifts. (*Dayton on Surrog.* 3d ed. p. 266.)

The proof offered, on the contrary, showed that the money was bounty money, and was delivered by an able-bodied man to the appellant, at the time of his enlistment into the army of the United States, in 1864, after having successfully passed the examination made by the surgeon with regard to his health and bodily fitness, as prescribed by the United States laws.

- II. The answer does not set up facts sufficients to consti-

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tute a valid *donatio mortis causa*, and the appellant having failed at the trial to move for leave to amend his answer by setting up the necessary facts in this respect, he could not be permitted to give any evidence of them.

For the foregoing reasons, the order denying the motion for a new trial, and the judgment entered in this action, should be affirmed.

By the court, ROBERTSON, Ch. J. The only defense which the answer in this case sets up is, that the intestate (Jacob Dexheimer), of whose estate the plaintiff is administrator, gave the sum sued for to the defendant, in case of the death of the former at any time, without reference to any specific imminent peril. The defendant's counsel offered on the trial to prove that the gift was one "*mortis causa*," and made "about the time the intestate went to *the war*," and that he was "*killed in the war*," without having revoked it.

Thereupon, it being admitted that the money claimed was delivered to the defendant by the intestate, when he enlisted *in the army*, and was part of his bounty money, the court refused to receive such facts in evidence, and held that the facts stated in the answer did not constitute any defense, and directed a verdict for the plaintiff. To which refusal, decision and direction, exceptions were duly taken by the defendant.

Such a gift as that alleged in the answer was clearly either an absolute one, or void. Death by any casualty, at any time, did not render it a "*donatio mortis causa*," because it was inevitable. No case is to be found of a *donatio mortis causa*, unless by some imminent peril, and when that has passed away, the giver has a right to revoke it. It is immaterial whether such a gift be a conditional one, dependent upon the escape of the donor from impending peril, or a revocable one, dependent upon his death thereby, without any revocation, or whether the peril be confined to sickness, or may include the dangers of traveling, navigation or battle.

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(*Just. Inst. Lib.* 2, 7; 2 *Kent's Com.* 444; *Dayton on Sur.* 3d ed. 262, 263.)

The evidence subsequently introduced by way of admission did not establish a gift at all. The answer, therefore, either did not contain a defense, or was unproved, and the direction to find a verdict for plaintiff was proper.

The judgment and order denying a new trial should be affirmed, with costs.

GARVIN, J., concurred.

BARBOUR, J., delivered the following *dissenting* opinion:

This action was brought to recover the sum of \$625, alleged in the complaint to have belonged to the plaintiff's intestate, at the time of his being killed, in March, 1865, and to be unjustly detained from such plaintiff by the defendant. The answer avers that such intestate was, in August, 1864, the owner of such money, and then "made an actual, free, voluntary and valid gift of the same to the defendant, and delivered it to him, with a direction to him to keep the same, in case of the decease of the donor; that the said donor died without revoking such gift, and that thereby the defendant became the absolute owner of said money."

Upon the trial, the plaintiff's counsel waived a portion of the amount of his claim, and proved the interest on the remainder from the date of the demand; and the counsel for each of the respective parties thereupon admitted and agreed, in open court, "that the money referred to in the pleadings was delivered by Jacob Dexheimer, deceased, to the defendant, at or about the time of the said Jacob's enlistment into the army of the United States, and constituted a portion of his bounty money received by him at the time of his enlistment." The court excluded the evidence which was offered by the defendant's counsel, to prove the fact that the gift was made, as set forth in the answer, and directed the jury to find a verdict for the plaintiff.

As the funds delivered to the defendant were the bounty

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moneys which had been paid to Jacob Dexheimer, upon his enlistment, we may assume that when such delivery was made, the latter was a soldier of the United States, and about to take his place in an army which was then employed in a most bloody war, a war in which probably fully one-fourth of all who were actually engaged in it laid down their lives. The enlistment, too, was at so late a period in the war that the hazards and dangers of the service were well understood and known by all, and it follows that it was in view of those hazards, and of the uncertainty of his ever returning alive to claim his money, that the same was delivered by the soldier to the defendant.

Why, then, was not the alleged gift, if made, a good and complete *donatio mortis causa*? Homer tell us that when Telemachus was about to engage in a conflict with the suitors of Penelope, he gave certain treasures, in case he should fall, to his friend Peirocus (*Odyssey* B. 17, 781), a case very similar to the one before us; and Sir William Blackstone says that was a very complete *donatio mortis causa*. (2 *Bl. Comm.* 514.) It is true the text in the *Commentaries* speaks of a gift of this character as a death bed disposition of property, as a delivery of goods by a person in his last sickness, to keep in case of his death. But the note of Sir William, above cited, shows he did not design to be understood as saying that such donations could be made only during a last sickness or upon the death bed of the donor, but merely as an instance, and the most common one.

Swinburne speaks of this class of donations as "those gifts which he made in *consideration of death*." (*Swinb. part 1, § 6, p. 4.*) But he does not limit the power to make such gifts during a last sickness or upon the bed of death.

Chancellor KENT says it is essential to such gifts that the donor make them in his last sickness, or in *contemplation and expectation of death*, and that the *apprehension* of death may arise from infirmity or old age, or from *external and anticipated danger*. (2 *Kent's Comm.* 244.)

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Bonner calls them gifts *in prospect* of death, and says such a gift must be made in *peril* of death, or during the donor's last illness, and to take effect only in case he dies. (*1 Bonn. Am. Law Jur.* 277.)

Mr. Burrell, after citing the definition of Blackstone as above, says such definition is too narrow, in so far as it confines this species of gift to cases of last illness, it being sufficient if the *apprehension* of death arise from other causes, as from *infirmitiy*, old age, or any external or anticipated danger. (*Burr. Law Dict. Don. Causa Mort.*) See further *Walter agt. Hodge* (2 *Swanst. R.* 97), where the donor, although not in perfect health, was not dangerously sick, but well enough to go and return from the Bank of England; and *Tate agt. Hilborth* (2 *Ves. Jr.* 112), in which the giver was old and infirm, but had no particular or dangerous illness.

If then, a gift is void as a *donatio mortis causa*, when made in contemplation, expectation, consideration, apprehension or prospect of death, arising from sickness, infirmity, old age, or any external or anticipated peril or danger, as seems to be fully established by the learned writers above mentioned and the authorities cited by them, there can be no good reason why an enlisted soldier of the United States might not, under the circumstances detailed in the pleadings and admissions of the parties, have made such a gift of his bounty money to another as would constitute a good and complete donation *mortis causa*. The obligation assumed by such soldier almost necessarily exposed his life to extraordinary perils and dangers.

I am of opinion that, if the gift had been proven, the defendant would have been entitled to judgment upon the issues, and, therefore, that the learned justice erred in excluding the evidence offered and directing a verdict for the plaintiff.

The judgment should be reversed, with costs, and a new trial ordered.

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COURT OF APPEALS.

EDWIN CLARK and DAVID B. O. FORD, administrators with the will annexed, &c., of **NATHAN FORD**, deceased, appellants
agt. **CHILION FORD**, late administrator, &c., respondent.

Proceedings in equity, by legatees, for a distribution of an estate, instituted after the expiration of one year from the granting of letters, is barred by the statute of limitations in the same time as an action at law.

January Term, 1867.

APPEAL from the judgment of the general term, fourth district, reversing an order of the surrogate of St. Lawrence county.

Nathan Ford died in 1829, leaving a will of real and personal estate, which was duly proved before the surrogate of St. Lawrence county, and letters testamentary were granted to the executors therein named, all of whom died on or before April 2d, 1842, and letters of administration with the will annexed were issued to Chilion Ford, the respondent. He was superseded as such administrator on 13th July, 1850, and Edwin Clark and David B. O. Ford, the appellants, were appointed in his place.

On the 16th June, 1860, the appellants presented their petition to the surrogate of St. Lawrence county, setting forth the above facts, and also stating that there had never been a general accounting by Chilion Ford as such administrator; that large sums of money came into his hands which belong to the residuary legatees of said Nathan Ford, or their assignees or representatives; and that the appellant, Edwin Clark, is the owner, by assignment, of five-twentieths of the estate, and that the appellant, David B. O. Ford, is the owner, as one of the residuary legatees, of one-tenth of the estate, and as assignee, of one-twentieth.

The petition is made by the appellants as such administrators, and in their own right, as such assignees and residuary

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legatees, and prays, "that said Chilion Ford may account for all of the property and effects of said estate that came to his possession, and may pay over the same."

Chilion Ford answered, "that he ought not to be required to account, because the time limited by law within which he might have been required to account as such administrator had elapsed long before the commencement of these proceedings, and that none of the claims of the petitioners against him as such administrator had accrued within the time limited by law for the commencement of proceedings to enforce the same, but were barred by the statute of limitations."

The surrogate overruled this answer, and ordered him to render a final account. The supreme court, on appeal, reversed this order.

SCRUGHAM, J. In proceedings instituted by successors of an administrator, to compel an accounting by his predecessor, the surrogate cannot make any decree for the payment or distribution of such part of the estate as may remain to be paid or distributed, but he may do so when the proceedings are taken upon the application of a person having a demand against the estate, either as creditor, legatee or next of kin. (2 R. S. 95, § 71.)

The prayer of the petition to the surrogate was not merely for an accounting, but also that the respondent should be required to pay over to the petitioners the property and effects of the estate.

The petitioners applied in two characters, as successors of the administrators, and as persons having demands against the estate as legatees. There is no provision in the statute for such joint application, and the character of the proceeding instituted by the petition must be determined by the nature of the relief sought by it. If it had been merely for an accounting, it could be properly regarded as a proceeding by the successors of an administrator, to compel their predecessor to account; but as it sought besides a decree of the surrogate

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which could not be made upon such proceeding, but which might be proper upon an accounting compelled by persons having a demand against the estate as legatees, it should be treated only as a proceeding instituted by the appellants in that character.

The respondent was appointed administrator with the will annexed, on the death of the last executor, in 1842, was superseded on the 13th July, 1850, and the appellants did not present their petition until the 16th June, 1860.

An action at law is given by statute to legatees entitled to share in the distribution of an estate (2 R. S. 114, § 9), and it may be commenced at the expiration of one year from the granting of letters testamentary or of administration. This remedy was barred by the statute of limitations, long before these proceedings before the surrogate were commenced.

Before the Revised Statutes, there was no statutory limitation of the time within which suits might be commenced in the court of chancery, and yet it was uniformly held, that when the claim was one which could have been enforced by an action at law, the statute of limitation which barred the remedy at law would be applied to the suit in chancery; that the equitable remedy, in a case of concurrent jurisdiction, is subject to the same limitation as the legal. (*John B. Murray, &c. agt. John G. Costar, &c.* 20 Johns. 576, 610; *Kane agt. Bloodgood*, 7 Johns. Ch. 91.)

The principles upon which this doctrine was established in courts of equity are equally applicable to proceedings in surrogates' courts, and it was accordingly held by the late chancellor, in *McCarter agt. Camel* (1 Barb. Ch. R. 465), that the surrogate could not entertain proceedings to enforce the payment of a distributive share of an estate, which were not instituted before the expiration of the time within which the distributee might have brought an action under the 9th section of the statute to which reference has been made.

The judgment should be affirmed, with costs.

All concur. Affirmed.

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SUPREME COURT.

THE PEOPLE *ex rel.* JOHN CROUSE and others agt. GEORGE W. COWLES, County Judge of Wayne County.

An attachment issued under the Revised Statutes entitled "of proceedings for contempt to enforce civil remedies," is a mere substitute for an execution against the body. It is equivalent to a *capias ad satisficiendum*.

It is an execution in a *civil action*, upon which the defendant would be entitled to the *jail liberties*, under section 40 of article 3, chapter 8, part 2 of the Revised Statutes, page 433.

Such an attachment is a mere *civil process* to enforce the payment of money; and is regular process for that purpose. But it seems that a female cannot be arrested or imprisoned on such process. (*Code*, § 179.)

Monroe General Term, December, 1867.

Present, WELLES, J. C. SMITH and E. D. SMITH, Justices.

CERTIORARI upon proceedings upon *habeas corpus*.

October 15, 1866, John Crouse and others recovered a judgment in this court against one Marinda Wheeler, a married woman, for \$723.24. The venue was laid in Onondaga county. A transcript was duly docketed in Wayne county, where the said Marinda resided, and an execution issued to that county and returned *nulla bona*.

The defendant was examined before a referee, upon an order made by Judge MORGAN, and it was found that she had some \$900 in cash in her possession.

Upon the report of the referee, Judge MORGAN, December 18, 1866, upon notice to said Marinda, made an order that she pay the said judgment and \$40 costs of the proceedings, within ten days, or that in default thereof an attachment issue against her. It appeared by such report that said Marinda was a married woman. She appealed from this order to the general term, where the order was affirmed.

The order was duly served upon the said Marinda, and upon her refusal to comply therewith, an attachment, after being allowed by the court, was issued against her, as for contempt, and she was arrested and conveyed to the common

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jail of the county. The county judge granted a *habeas corpus*, directed to the sheriff, and upon the return showing these facts, and upon the admissions of the parties, decided that said Marinda was entitled to the liberties of the jail, upon issuing the proper bond, and ordered her discharge from close custody upon executing such bond.

This *certiorari* is issued to review that order, the plaintiffs in the judgment claiming that said Marinda is not entitled to the jail liberties, and that Judge COWLES had no jurisdiction to discharge her from close custody.

PRATT & MITCHELL, *for relators.*

I. The justice and legality of the order directing the payment of the judgment could not be inquired into before the county judge, and is not open for discussion here.

1. Those matters were properly before the judge who granted the order, and having been decided by him, cannot be inquired into collaterally. The only remedy is by appeal. (32 *How.* 309; 7 *Hill*, 301; 7 *How. U. S.* 21.)

2. The party did appeal to the general term, and the order, upon solemn argument, was affirmed.

3. These decisions dispose of all objections to the jurisdiction of the judge to hear and determine the matter, and all other objections to the order.

4. It disposes of all questions in regard to the validity of the order, whether the points or objections were taken or not.

II. A married woman, like any other person, is liable to punishment, as for a contempt, for disobeying an order of the court.

1. She may be attached for disobeying a subpoena, for refusing to testify, or for disobeying any other valid order of the court or judge.

2. To hold that she cannot be imprisoned for refusing to obey an order to pay money or apply other property in discharge of judgments against her, would enable her in all cases, by converting her tangible property into cash or choses in action, to put her creditors at defiance.

3. The provision of the statute, that no female shall be imprisoned on any process in any civil action founded upon contract, does not apply to process as for contempt.

(a.) The process of attachment for contempt is not deemed process in a civil action; it is in the nature of original process to punish for disobeying the orders of the court.

(b.) When the disobedience affects the interest of parties, the court may use its power to punish to recompense the party for the injury sustained. (2 *R. S.* 534, 535; *People agt. Nevins*, 1 *Hill*, 155.)

(c.) It is not process in an action upon contract; it is process to punish for disobeying a valid order.

III. The defendant in the process was not entitled to the jail liberties.

1. The commitment in this case was for disobeying the order of Judge MORGAN, directing her to pay the judgment and interest, with the costs of the proceedings.

2. The statute prescribes that all persons committed to any jail, upon process for contempt, except on attachments for the non payment of costs, shall be actually con-

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fined and detained within such jail until they shall be discharged by due course of law, and are not entitled to the jail liberties. (2 R. S. 433, § 40; Id. 437, § 61.)

3. This clearly was not a commitment for non-payment of costs, and therefore the prisoner was not entitled to the jail liberties. (1 Code R. 98; 4 Paige, 282.)

(a.) In the case in 4 Paige, the commitment did not show that the money to be paid was not for costs, and hence the chancellor refused to attach the sheriff for allowing the prisoner the liberties of the jail.

(b.) The chancellor, in his opinion, assumes that when the precept is for the payment of costs or other sums of money, the prisoner is entitled to the jail liberties; but it is manifest that the attention of the chancellor was not directed to the language of the statute.

IV. The statute made it the duty of the county judge, upon the return of the sheriff, forthwith to remand the prisoner, and his order, therefore, was without jurisdiction.

1. The statute directs him to forthwith remand the prisoner, if it shall appear that he is detained in custody for any contempt specially and plainly charged in the commitment, by some court or officer having jurisdiction to commit for such contempt. (2 R. S. 567, § 400.)

2. The contempt in this case was specially and plainly charged in the commitment.

(a.) The order made by Judge MORGAN was set out in the commitment, directing the payment of the judgment.

(b.) The validity of that order, as has been shewn, cannot be questioned collaterally.

(c.) The commitment shows that the prisoner refused to comply with and obey the order, which refusal was plainly a contempt, for which the court had authority to commit. (2 R. S. 535: 20 How. 454; 22 Id. 309; 13 Abb. Pr. 459; 10 Barb. 523; 1 Kernan, 324; S. C. 1 Hill, 165; 24 N. Y. 74; Brush agt. Lee, Court of Appeals, decided June 7, 1867.)

3. An irregularity in issuing the attachment cannot be inquired into upon *habeas corpus*. The remedy is by motion to set aside the attachment.

4. The process need not recite all the proceedings giving jurisdiction. (11 N. Y. R. 324.)

V. The order of the county judge should therefore be reversed, and the prisoner remanded to the custody of the sheriff.

LYONS & NORTON for respondent.

I. This case is to be heard upon the return to the *certiorari*, with the same rights to the relator as though the application had been originally made to this court; i. e., should this court determine that the relator was entitled to her discharge before his honor Judge COWLES, she is now entitled to her discharge at the hands of this court.

II. Where the commitment is for an alleged contempt for not obeying an order, it may, on *habeas corpus*, be examined and determined whether the prisoner is properly committed and held by authority of law, unless in a bailable case, where bail is offered and receivable. (People agt. Nevins, 1 Hill, 171.)

(a.) When the return to a writ of *habeas corpus* shows a detainer under legal process, the only proper points for examination are the existence, validity and present legal force of the process. (People agt. Kelly, 1 Abb. N. S. 435.)

(b.) In *The People agt. McLeod*, Justice COWEN says, 2d Revised Statutes, 469, 2d edition, sections 40, 41 (§§ 55, 46, of vol. 3, 5th ed. R. S. p. 887), requires us to examine the facts contained in the return, and into the cause of the confinement of the prisoner, and if no legal cause be shown for it, or for its continuance, we are to discharge him.

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(c.) The relief granted upon *habeas corpus*, against defective convictions and commitments, is in some respects analogous to the relief obtained upon a writ of error. It is in one respect more desirable, because it is more prompt in relieving the prisoner from imprisonment; but on the other hand, it leaves the order or judgment in force (4 John. R. 360; *In the matter of Miller*, 1 Daly, 575; S. C. 19 Abb. 394; *Hurd on Hab. Cor.* 270.)

III. The authority and power of the county judge to examine and discharge is, within his county, as great and co-extensive as those of the supreme court in term; and this, too, although there is a term of the supreme court in session in this county at the time of the hearing. (3 Hill, 652, note 5; *Matter of Miller*, 1 Daly, 562; S. C. sub nom. *case of twelve commitments*, 19 Abb. 394.)

IV. The facts set forth in the return, being admitted, or not denied, the law of the case alone is to be inquired into, and the proceeding is the same as if the return were formally demurred to. (3 Hill, 658, note 28.)

(a.) The party brought up may deny any of the material facts set forth in the return, or allege any fact to show either that his imprisonment or detention is unlawful, or that he is entitled to his discharge; which allegations or denials shall be on oath; and thereupon the court shall proceed in a summary manner to hear, &c. (3 Hill, 658, note 29.)

(b.) When the return shows that the prisoner is legally detained on civil process, he may show by affidavit that he is privileged from arrest. (*Hurd on Hab. Cor.* 270.)

V. The facts in this case show that this was an action founded on contract.

Proceedings supplementary to execution are proceedings in the original action. (See 24 How. 137; 26 Id. 59; 15 Id. 19, 412; 19 Id. 560; 15 Abb. 307.)

VII. The relator is and was a married woman. (See *Return*, p. 21.)

1. The relator being a female, is not liable to arrest and imprisonment upon any process in any civil action founded upon contract. (See R. S. 5th ed., p. 725, § 9.)

2. The statute above referred to is in full force and not repealed.

(a.) The right of a party cannot be done away with by judicial construction. It must be by legislative enactment. (See 42 Barb., 435, 440.)

(It is claimed that the process upon which the relator is committed is not process in a civil action.)

(a.) The order in question is in effect an execution to compel the relator, by means of an imprisonment of her person, to pay the debt and costs of the plaintiffs (Crouse and others). (See *People agt. Bennett*, 4 Paige, 282; 10 How., 564; 4 Hill, 577, 578.)

(b.) It is process within the meaning of section 9, of page 725, of volume 3, of 5th edition of Revised Statutes, which is in these words:

"No female shall be imprisoned on any process in any civil action founded on contract."

"Blackstone, in writing of contempt, volume 4, pages 284, 285, says:

"Those committed by parties to any suit or proceeding before the court, as disobedience to any rule or order, and in the progress of a cause, by non-payment of costs awarded by the court upon a motion or the non-observance of awards duly made by arbitrators or umpires, after having entered into a rule for submitting to such arbitration. Indeed the attachment for most of this species of contempt, and especially for non-payment of costs, and non-performance of awards, is to be looked upon rather as a civil execution for the benefit of the injured party, though carried on in the shape of a criminal process for contempt of the authority of the court—and therefore it hath been held that such contempt and the processes thereon, being properly the civil remedy of individuals for a private injury are not released or affected by a general act of pardon."

VIII. Individuals can only be deprived of liberty by some process of law.

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(a.) There is no law that authorizes or warrants the arrest of a female, except it be,

1. For the commission of a crime ; or,

2. For the willful injury to personal character or property (under sub. 5 of § 179 of Code).

(b.) The right to arrest the relator (if any exists) upon such process, is only derived by implication from the general law.

(c.) But the right of one person to deprive another of his or her liberty, is never derived by implication. It must be by some positive law.

IX. This is not a contempt. It is simply a proceeding as for a contempt to enforce a civil remedy to protect the rights of parties in civil actions. (See *act vol. 3 R. S.*, 5th ed., p. 849; *vol. 3, R. S.*, 5th ed., ps. 467 to 470, §§ .)

(a.) This is not a proceeding by the court to vindicate its power and dignity. If it were, the court would punish criminally.

(b.) The court cannot punish criminally in such cases. It being a proceeding in the nature of a civil execution to collect a judgment for the party.

(c.) But if it were a case in which the court could punish criminally, then we say it has not been done, and without which the relator could not lawfully be arrested.

(d.) The precept does not show any adjudication, in terms, that the relator was guilty of, or had committed a contempt, but omit any adjudication or recital of an adjudication that the relator had committed a contempt, and goes on to set out the various steps or proceedings, and orders in the proceedings, against the relator, to compel her to pay over the money, and that she had not done so. The contempt is not charged in terms, but recitals are set forth, from which it is to be inferred or deduced, that she was or is guilty of a contempt. (See *Return*, ps. 15, 16.)

(e.) The order convicting of a contempt in a proceeding to enforce a civil remedy, should recite the substance of the alleged misconduct. *The adjudication of the court that the accused is guilty*, and that such misconduct was calculated to, and did impair, defeat, impede and prejudice the rights, &c., of the parties, and should direct the payment of a fine, stating its several items, &c. (See *9 Paige*, 372; *2 id.* 103.)

X. The case of a witness disobeying a subpoena, or refusing to testify, is not analogous to this case.

XI. The decision of the committing magistrate that he had jurisdiction of the proceeding instituted before him, and which resulted in the imprisonment complained of, does not preclude an officer before whom the party committed may be brought upon *habeas corpus*, from inquiring into the jurisdiction. (5 Abb., 281; 5 Hill, 164.)

(a.) Upon *habeas corpus* to inquire into the detention of a person committed for contempt, the officer by whom such writ is issued, may inquire into the jurisdiction of the tribunal by which the prisoner is committed; and also into the form of the commitment. (29 Barb., 622; 7 Abb., 96.)

(b.) In *Kearney's* case, the question as to whether there was or was not a conviction for a contempt, was not raised, and was not passed upon by the court. In that case it was the case of a man and not of a woman.

XII. This being the case of a female, and there being no direct law authorizing or warranting her arrest and imprisonment upon such process: Therefore, we say that she stands in the same light as a person who is privileged from arrest, except in those cases specially provided for by law.

XIII. The amendment of 1867 to section 292 of the Code, viz.: "But in case of an order made by a justice of the supreme court, all subsequent proceedings shall be had before some justice in the judicial district where the judgment debtor resides, to be specified in the order," passed prior to the making of the order of commitment which is dated the 29th of June, 1867, with the fact that the relator was and is a resident of the county of Wayne in the 7th judicial district, while the order of com-

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mitment is made by a justice of the 5th district—all of which appears on the face of the commitment—shows that Judge MORGAN had no jurisdiction to make the order, and that imprisonment of the relator is, and always has been, unlawful. (See *Commitment*, p. 16 of *Return*.)

(a.) The order of commitment was issued without any notice to the relator. (See *Return*.)

(b.) The return does not show that any order was ever granted allowing the attachment to issue, after the order to pay over was granted, nor has the relator any notice that there ever was such an order granted. (See *Return*.)

XIV. Where the judgment roll directs the judgment to be paid out of the separate estate of a married woman, an execution against her separate estate is the only process that can be issued against her. (See *Code*, § 287; 42 *Barb., supra.*)

(a.) The issuing and return of an execution unsatisfied against the separate estate of a married woman, is evidence that she has no property, and is binding upon the plaintiff.

(b.) This goes to the question of jurisdiction, which can be raised at any time, and upon any and all occasions.

XV. In case the court should determine that the relator is not entitled to her discharge, then we say:

1. A party who is committed as for a contempt for the non-payment of costs or other sum of money, is entitled to the jail liberties. (4 *Paige*, 282 and 397; 3 *R. S.*, 54th ed., p. 850, § 4.)

(a.) It is only where a party is committed for a criminal contempt, that he is not entitled to jail liberties. (4 *Paige, supra*; 2 *id.*, 103.)

(b.) The precept issues in a case like the present to enforce payment of the judgment, and not as a punishment.

(c.) This is a proceeding on the part of plaintiff to enforce the execution and collect their judgment; it is not a proceeding on the part of the court to vindicate its power or dignity. (See *Blackstone, supra.*)

The relator therefore claims:

1. That she is entitled to her discharge, and that therefore the order of the county judge be reversed and she be discharged from further custody.

2. That in case the court determines that the relator is not entitled to her discharge, that then the order of the county judge be affirmed.

By the court, E. DARWIN SMITH, J. Upon the return to the writ of *habeas corpus*, it appeared that the petitioner Marinda C. Wheeler, was imprisoned in the jail of Wayne county, upon an attachment issued out of this court for the non-compliance by her with an order made in supplemental proceedings, by one of the judges of this court at chambers, requiring her to pay to the relators the amount of a judgment recovered by them against her in this court, amounting to the sum of \$723.64, and interest thereon from the 15th day of October, 1866, and \$40 costs in such supplemental proceedings. It also appeared upon such return, and by the admission of the parties that the petitioner, for such

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writ of *habeas corpus*, was a married woman, and that the said judgment was recovered for goods sold to her, and that the said judgment directed the payment of the same out of her separate property. It also appeared that the order, made in such supplemental proceedings requiring the said petitioner to pay such judgment and costs, within ten days after its date, or in default thereof, that an attachment issue against her, had been appealed from and had been affirmed at a general term of this court in the 5th district (33 *How.*, p. 337). The order must, therefore, be denied in this proceeding, and I do not see why it was not a valid order. It was an order for the payment of money, and it was admitted on the return of such *habeas corpus*, that said order directing such payment, was based upon the assumption that the said Marinda C. Wheeler, had means in her possession sufficient to pay said judgment. The attachment was issued under section 4 of title 13, chapter 8, part 3 of the Revised Statutes, entitled "of proceedings for contempts to enforce civil remedies." This section is as follows: "When any rule or order of a court shall have been made for payment of costs or any other sum of money, and proof by affidavit shall be made of the personal demand of such sum of money, and of a refusal to pay, the court may issue a precept to commit the person so disobeying, to prison until such sum and the costs and expenses of the proceeding be paid." The section clearly authorizes the issuing of the attachment, under which the petitioner was imprisoned. Such an attachment, however, is a mere substitute for an execution against the body. It is equivalent to a *capias ad satisfaciendum*. It is an execution in a civil action upon which the defendant, if she had been a man, would have been entitled to the jail liberties under section 40, of article 3, chapter 8, part 2 of the Revised Statutes, page 433. This was expressly held by Chancellor WALWORTH, in *Van Wezel agt. Van Wezel* (3 *Paige*, 38), and in the *People ex rel. Hawley agt. Bennett* (4 *Id.* 282). The order of the

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county judge letting the petitioner to bail upon the jail limits was therefore entirely correct, if the defendant could be imprisoned on execution, and must be affirmed. If the order had directed the payment of the judgment out of any particular fund, or directed the doing by the defendant of any particular act or thing to effectuate such payment, then the disobedience of such order would have been a contempt for which, upon a proper conviction by the judge or court, a fine might have been imposed, and upon such fine the defendant, though a married woman, might have been imprisoned as upon criminal process. But here there has been no appearance or hearing before the court or judge, no adjudication that the petitioner was in contempt, and no fine has been imposed upon her, and the attachment is a mere civil process to enforce the payment of money. It is regular as process for that purpose, but if the question were before us we should be obliged to hold, that a female could not be arrested or imprisoned on such process (*Code*, § 179), and the county judge should so have held, and have discharged the petitioner entirely from the said imprisonment. The order of the county judge must therefore be affirmed with costs.

N. Y. SUPERIOR COURT.

ALFRED A. DOLEVIN, plaintiff agt. THEODORE H. WILDER,
defendant.

The cases of *Bush agt. Prosser* (14 N. Y. R. 347) and *Brisby agt. Shaw* (12 id. 67), settle two principles in the law relative to actions of *libel* and *slander*, under the Code:

First. That mitigating circumstances may be pleaded in connection with a general denial, and with or without a plea of justification.

Second. That all matters which tend to disprove malice may be pleaded in mitigation of damages, although they may tend to prove the truth of the words complained of. But these principles require that the defendant, seeking to mitigate damages by pleading facts and circumstances which induced him to believe the charge to be true at the time he made it, must state such facts and circumstances as would rea-

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sonably induce, in the mind of a person possessed of ordinary intelligence and knowledge, a belief of the truth of the charge.

The pleadings should show that the defendant, at the time he made the charge, knew the facts and circumstances on which he relies.

Also, the defendant should either expressly aver that such facts and circumstances induced a belief in the truth of the charge at the time he made it, or that the facts and circumstances should carry with them a reasonable presumption that he believed the charge to be true.

Questions as to whether there was no malice in making the charge, or if any, to what extent, are eminently proper to be submitted to the jury. The Code has made no change in the previous law on this subject.

As mitigatory facts may now be pleaded, the rule governing the admission of evidence thereof should be applied as far as possible to the pleading.

One of these rules of evidence is, to admit proof of any fact which might possibly bear on the question of malice. Another is, that, if there is the slightest doubt in the mind of the judge as to whether the facts proposed to be proven tend to disprove malice, to admit the evidence and submit the question to the jury under proper instructions.

These rules should now be applied upon a motion to strike out parts of an answer setting up facts and circumstances in mitigation of damages.

Where the absence of averments, in an answer, forbids any presumption that, by any reason of the facts and transactions alleged, the defendant believed the charge to be true at the time he made it, such allegations will be stricken out on motion.

Where the allegations in the answer tried to show that the words were uttered *in the heat of passion*, caused by the present acts and conduct of the plaintiff, they may be retained.

Special Term, February, 1868. Decided February 17, 1868.

THIS is an action of slander. The words charged as having been uttered are, "You are a thief! you are a thief!"

The answer, amongst other things, alleges, in mitigation of damages, substantially as follows: That plaintiff and defendant are in the same line of business, to wit., sail makers; that about a year previous to the utterance of the words, the captain of a vessel came to defendant's place of business, at New York city, and directed his foreman to send to his vessel and get certain sails to repair; that plaintiff at that time was standing by, and immediately went to the vessel and represented to the captain that he came from the defendant to get the sails; that the captain thereupon delivered the sails to the plaintiff, who took them to his own place of business and repaired them, whereby the defendant lost a customer, and also the profit to be derived from repairing the sails; that since that time plaintiff has frequented defendant's place of

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business, hanging about on the steps thereof, interfering with his business, and enticing away his customers; that a day or two previous to the time mentioned in the complaint, plaintiff had enticed away one of defendant's customers; that defendant, irritated thereby, coming out of his place of business, saw the plaintiff standing on the steps, and said to him, "You leave; I believe you are a thief! If you do not get off, I will kick you off!"

The answer further alleges, in mitigation, that plaintiff, at the city of Boston, fraudulently and surreptitiously obtained from one Blaney, a sail maker, a bill due said Blaney from a certain vessel, for sails, &c., repaired and furnished to said vessel, and thereupon represented himself to the captain of said vessel as the agent of said Blaney, and collected from said captain the amount of said bill, and appropriated the same to his own use.

A motion is now made to strike out of the answer these allegations.

ANGELL & OAKSMITH, for plaintiff.

EMERSON & GOODRICH, for defendant.

JONES, J. The case of *Bush* agt. *Prosser* (11 N. Y. R. 347), and *Bisby* agt. *Shaw* (12 N. Y. R. 67), settle two principles in the law relative to actions for libel and slander, under the provisions of the Code. These are:

First. That mitigating circumstances may be pleaded in connection with a general denial, and with or without a plea of justification.

Second. That all matters which tend to disprove malice may be pleaded in mitigation of damages, although they may tend to prove the truth of the words complained of.

These principles, taken in connection with the law as it stood prior to the Code, which permitted a defendant to give, in mitigation of damages, evidence under the general issue of facts and circumstances, which induced him to

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believe the charge true at the time he made it, as tending to disprove malice, provided such facts and circumstances did not tend to prove the truth of the charge. (*Gilman* agt. *Lowell*, 8 Wend. R. 575; see *remarks in Bush* agt. *Prosser*, 11 N. Y. R. 355.) The further principle flows, that facts and circumstances which induced the defendant to believe the charge true at the time he made it, may now be pleaded in mitigation of damages, as tending to disprove malice, although they may also tend to prove the truth of the charge.

The question now arises, by what rules and principles is the sufficiency of an answer setting up mitigating matters to be treated?

Since such a plea was not allowed before the Code, we can of course find no guide in the decisions made prior to its passage, upon the sufficiency of pleadings; and since its passage, although more than twenty years have elapsed, there is a great paucity of decisions bearing on the subject.

It may, however, be safely asserted that a defendant cannot spread on the record any matters that he pleases, and then, by asserting that by reason thereof he verily believed the charge to be true at the time he made it, successfully resist a motion to strike them out.

From this one rule may be deduced, viz: that where a defendant seeks to mitigate damages by pleading facts and circumstances which induced him to believe the charge to be true at the time he made it, the facts and circumstances so pleaded must be such as would reasonably induce, in the mind of a person possessed of ordinary intelligence and knowledge, a belief of the truth of the charge.

Again, this species of evidence is admitted only for the purpose of disproving malice; and it must appear from all the proof at the trial, not only that the facts and circumstances were such as would reasonably induce, in the mind of a person possessed of ordinary intelligence and knowledge, a belief of the truth of the charge, but also that the defendant was in fact thereby induced to believe in its truth.

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From this, two other rules of pleading may be induced, viz:

First. That the pleadings should show that the defendant, at the time he made the charge, knew the facts and circumstances on which he relies; and,

Secondly. That he should either expressly aver that such facts and circumstances induced a belief in the truth of the charge at the time he made it; or that the facts and circumstances should carry with them a reasonable presumption that he believes the charge to be true.

Again, the questions as to whether there was no malice in making the charge, or if any, then to what extent, are eminently proper to be submitted to the jury. The Code has made no change in the previous law on this subject.

The rules, then, which governed the admission of proof as to mitigatory facts are (except so far as the exclusion of such facts rested on the ground that they tended to prove the truth of the charge) still in force; and as mitigatory facts may now be pleaded, the rule governing the admission of evidence thereof should be applied, as far as possible, to the pleading. One of these rules of evidence was to admit proof of any fact which might possibly bear on the question of malice, under, of course, the restriction, now no longer in force, that it did not tend to prove the truth of the charge. Another was, that, if there was the slightest doubt in the mind of the judge as to whether the facts proposed to be proven tended to disprove malice, then to admit the evidence and submit the question to the jury, under proper instructions.

These rules should now be applied upon a motion to strike out parts of an answer setting up facts and circumstances in mitigation of damages.

Testing the present answer by these principles, that portion of it which sets up the Boston transaction must be stricken out. The answer neither avers that the defendant knew of it at the time he made the charge, nor does it

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expressly aver that by it he was induced to believe the charge true at the time he made it. The absence of the averments forbids any presumption that by reason of this fact he believed the charge to be true at the time he made it.

With respect to the allegation respecting the enticing away of customers and interfering with his business, the facts alleged are not such as would reasonably induce, in the mind of a person possessed of ordinary intelligence and knowledge, a belief in the truth of the charge of theft.

To permit one to relieve himself from any part of the responsibility attached to the imputing to another the crime of theft, on the ground that he, on so slight a basis as this, believed the charge to be true, would be in effect to allow one who became dissatisfied with the conduct or business transaction of another towards or with him, to apply to such other person such epithets as he saw fit, and then, when called to account, to shield himself from a portion of the responsibility by the bare averment that the conduct or transaction in question induced in his mind a belief that the epithets were correctly applied.

It should be the policy of the law to inculcate the observance of orderly speech, and not by dealing leniently with those who, not being excited by passion reasonably aroused by present acts or language of another, or protected by some privilege known to the law, indulge in opprobrious epithets, encourage slanderous utterances, whereby breaches of the peace may ensue.

Not only are these allegations not of a character which should reasonably induce a belief in the truth of the charge, but they are not such as to carry with them a presumption that the defendant, by reason thereof, believed the charge to be true. It was therefore incumbent on him to expressly aver such belief. This he has failed to do.

For these reasons, but particularly for the first one, these allegations cannot be permitted to remain on the ground that

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by reason thereof defendant was induced to believe the charge to be true at the time he made it.

These allegations may, however, be retained on the ground that they tend to show that the words were uttered in the heat of passion, caused by the then present acts and conduct of the defendant.

The bare fact of seeing plaintiff standing on defendant's steps, would of itself, not be sufficient for this purpose. It is necessary, therefore, to go further and see if there is anything in the previous acts or conduct of plaintiff known to defendant, so characterizing the act of standing on the steps, as to reasonably lead to the conclusion that defendant uttered the words in question, under the excitement of passion caused by such act of defendant.

The pleader has done this, and has set forth those previous acts, and that former conduct which, as defendant claims, gave to the act committed at the time of the utterance of the words, a significance and character that excited his passions.

That the words charged were uttered in the heat of passion, caused by the act of the plaintiff, was provable in mitigation of damages prior to the Code, but then that matter could not be pleaded; it however, was admissible in evidence under the general issue. If the system of pleading then existing still continued, these matters now under consideration, could not have been pleaded, but on the trial the defendant could have proved that he was in a passion at the time he uttered the words, and to show that such passion was caused by the act of the plaintiff, he could prove the acts and language of the plaintiff at the time, and if those acts or that language only gained significance by reason of their connection with previous acts or language of the plaintiff, known to the defendant, he could then show those previous acts, or that former language, for the purpose of showing that plaintiff's acts and language, on the occasion in question, did cause his passion. This, of course, was sub-

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ject to the exception, that the acts and language did not tend to prove the truth of the charge, which exception, as repeatedly before remarked, no longer exists.

But now a defendant may plead matters which go in mitigation of damages merely. The question then arises whether in pleading, heat of passion in mitigation, the defendant should plead simply that he uttered the words in heat of passion caused by plaintiff, or should set forth the acts and language of plaintiff, which he claims, caused his passion. I think the latter mode is more conformable to the rules of pleading.

When an answer thus setting forth the acts and language of plaintiff, in mitigation is interposed, and a motion made to strike out parts as irrelevant the only duty devolving on the court, under the rules above laid down, is to see whether the matters pleaded can by any possibility be received in evidence; if so they should not be stricken out, if not they should be. In the performance of this duty, as above suggested, if there is the slightest doubt as to the matters being inadmissible, the court should refuse to strike out.

In the present case I cannot undertake to say, that the matters in question are clearly inadmissible.

What are they? These: Plaintiff and defendant are in the same line of business. Plaintiff about a year ago enticed away a customer of defendant's, since that time he has been lounging around defendant's place of business enticing away his customers, and a day or two previous to the utterance of the words, had enticed one away, and on the occasion of the utterance, defendant on coming out of his store, saw plaintiff on his steps, and being irritated thereby, used certain language specified.

Now, proof of the mere fact that plaintiff was standing on defendant's stoop, would of itself, be clearly insufficient to mitigate damages. But when that act is characterized by the previous acts and conduct of plaintiff, it may or may not be a mitigating circumstance according as the evidence

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developes particulars and circumstances, which cannot be inserted in a pleading. It would be a fair question for the jury whether the grievances theretofore suffered by defendant, were by seeing the plaintiff standing on his steps suddenly brought vividly to his mind, and he in the heat of a passion excited by a sense of the wrongs done him, thus suddenly flashed in his mind, uttered the words. The operations of the mind under circumstances like these, are instantaneous, and a slight circumstance will often call up a recollection of forgotten and forgiven injuries, and suddenly raised up an excitement, under the paroxism of which, words will be uttered and acts done which calm reflection would avoid.

I cannot say but that the evidence which may be adduced to prove the matters pleaded, will justify the jury in finding that the words were uttered in heat of passion thus excited.

If so, the fact of their being so uttered, must be taken in mitigation of damages.

But to justify the jury in so finding, the bare fact of plaintiff's standing on defendant's steps, will not as before stated, be sufficient, but that act must be construed by the other matters pleaded.

There being then one aspect in which proof of these facts may possibly be admissible, they cannot be stricken out.

Motion granted in part and denied in part, as above indicated, without costs to either party.

N. Y. SUPERIOR COURT.

JOSEPH FERRIER agt. THE AMERICAN GLASS SILVERING COMPANY.

Under the Code, the property of corporations created by or under the laws of this State, cannot be attached.

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Special Term, January, 1868.

MONELL, J. The defendants in this case are a corporation created by or under the laws of this state, and an attachment against its property has been granted on the ground of a fraudulent disposition of its property.

The motion is to vacate and set aside such attachment.

I have not been able to find any provision in the Code which authorizes the issuing of an attachment against a domestic corporation. The question is new, and has not, that I am aware been adjudicated upon.

If the power to grant attachments against property, which is given in terms by section 227 of the Code, was confined to that section, it might be interpreted to embrace domestic as well as foreign corporations; for although it declares that in actions, &c., "against a corporation created by or under the laws of any other state, government, or country, or against a defendant who is not a resident of this state, or against a defendant who has absconded or concealed himself," the plaintiff may have the defendants' property attached; yet it also provides, that "whenever any person or corporation is about to remove any of his or its property from this state, or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, any of his or its property with intent to defraud creditors," &c., an attachment in like manner may be issued. There would therefore seem to be, not only two classes of defendants, but two classes of cases, subject to the provisions of that section: (1.) Foreign corporations and non-resident, absconding, or concealed defendants, in the one class; and (2.) persons and corporations doing or intending to do some of the acts specified to defraud creditors, in the other class. The term "corporation," where it occurs the second time in the section, unlike its occurrence in the first part, is not apparently restricted or confined to foreign corporations, but is general; and if the section stood alone, might well be construed to mean any corporation; and strength therefore would be

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given to such construction, from the fact that the property of a foreign corporation can be attached as of course, and without any allegation of a fraudulent disposition of it. Whereas the property of other corporations, necessarily including such as were created by or under the laws of this state, can be attached only on proof of an intention to defraud creditors: thus rendering the use of the term "corporation" in the second branch of the section unnecessary, unless it was the intention of the legislature to apply the section to such latter corporations; and I should yield to such construction were there not other parts of the Code which seem to me to wholly destroy the inference.

Although the section referred to specifies the cases in which attachments may issue, and apparently includes domestic corporations, yet the requisite proof to obtain their issue is prescribed in the 229th section. That section provides that "the warrant may be issued whenever it shall appear, by affidavit, that a cause of action exists * * * and that the defendant is either a foreign corporation, or not a resident of this state, or has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with the like intent; or that *such* corporation or person has removed, or is about to remove, any of his or its property from this state, with intent to defraud his or its creditors; or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, any of his or its property, with the like intent, whether such defendant be a resident of this state or not."

It will be seen that in this section, which prescribes the manner and substance of the proof required, the words "*such* corporation" is employed, which necessarily, it seems to me, refers to the foreign corporation in the beginning of the section, and not to the term "corporation" in the 227th section. It would be difficult, I think, to discern a satisfactory reason for the change or difference of designation in the two sections, unless upon the supposition that the direct

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and immediate reference intended by the word "such," was deemed more important in the section which prescribes the nature of the proof required, than in the section which designates the cases in which attachments may be issued; or that it was omitted, through oversight or mistake, from the first section.

It cannot be said, in reference to the 229th section, that the apparent or seeming want of any necessity in the 227th section for a further provision for attachments against foreign corporations or non-resident defendants being required, inasmuch as their property can be attached without proof of a fraudulent intent, is a reason for the belief that the legislature intended the latter proof to apply to domestic corporations or residents of the state only; for the latter clause of the 229th section in express terms authorizes the issuing of attachments, upon proof of a fraudulent intent, "whether such defendant be a resident of this state or not," thus clearly including non-residents among those whose property may be attached, upon proof of its fraudulent disposition, notwithstanding an attachment may be issued upon proof of non-residence merely.

This accumulative proof, so seemingly unnecessary in the case of non-residents, aids us in getting at the intention of the legislature, which would seem to have been that the property of foreign corporations only was to be made liable to seizure on attachment; for otherwise the word "such" would have no significance. It seems to me, therefore, that not only the literal reading, but also the fair interpretation of the two sections taken together, is that foreign corporations only were intended to be subjected to the law of attachments in actions.

There is another section which strengthens the view I have taken of this question. The 239th section provides that, "if the *foreign* corporation, or absent, or absconding, or concealed defendant, recover judgment against the plaintiff in such action," &c., the sheriff shall deliver the property

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attached, or the proceeds, to the defendant; that the warrant be discharged and the property released from the attachment. In that section, corporations other than foreign are not mentioned, and no provision is made for a judgment in favor of a domestic corporation; thus leading to the conclusion that such corporations were not included in the class mentioned in the previous sections.

Under the Revised Statutes, attachments against property were allowed only against foreign corporations and absconding, concealed or non-resident debtors (*2 R. S. 1 and 459*); and therefore the provisions of the Code, extending such provisional remedy to debtors who had fraudulently disposed of their property, is new.

It may be, that in excluding corporations existing under the laws of this state, the legislature had in view the power which the Revised Statutes has given to the courts (*2 R. S. 462, § 33, sub. 7, 8*), to set aside alienations of property made by trustees or other officers of corporations, for purposes foreign to the lawful business and objects of the corporation; and to restrain and prevent any such alienations, in cases where it may be threatened; and that such power was regarded as a sufficient remedy and protection to creditors, without extending to them the remedy which the Code provides.

I have referred, I believe, to all the provisions of the Code which can aid in determining the question presented upon this motion; and their examination has satisfied me that they do not authorize the property of corporations created by or under the laws of this state to be attached.

The motion to set aside the attachment must, therefore, be granted.

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N. Y. SUPERIOR COURT.

BENJAMIN WOOD agt. THE MAYOR, CORPORATION, &c.

The amended charter of 1857, of the city of New York, provides that, to make the proceedings of the common council legal and binding, they must be advertised for a certain specified time in the corporation newspapers.

Where a newspaper was designated as one of such papers, with instructions that it should publish the proceedings of the different boards, and services thereunder were performed before the law of May 4, 1866, called the tax levy law, was passed, and the plaintiff's rights had accrued and were vested:

Held, that the 10th section of the act of May 4, 1866, could not act retrospectively so as to affect the plaintiff's right to recover for such services.

Heard at Special Term, June, 1866.

ROGER A. PRYOR, Esq., for plaintiff.

RICHARD O'GORMAN, corporation counsel, for defendants.

After the arguments of counsel, Mr. Justice McCUNN said:

This is an action to recover \$30,000 and upwards, for advertising done by plaintiff for defendants. The complaint is in the usual form for services rendered. The answer admits that there is justly due and owing the plaintiff the sum of \$23,819.25, being a part of plaintiff's account, and sets up a general denial to the balance.

Application is now made, under section 244 of the Code, for an order directing the comptroller to pay over the amount admitted to be due by the answer. The corporation counsel, in his points, urges that, notwithstanding the admission contained in the answer, "that there is justly due and owing to the plaintiff the sum of \$23,815.25," yet, under section 10 of what is commonly called the city tax law, or tax levy, passed May 4, 1866, wherein it says "no judgments in actions upon contract shall be entered, by default or otherwise, against the corporation, except upon proofs in open court that the amount sought to be recovered still remains unexpended in the treasury to the credit of the appropriation to the specific object or purpose upon the claim sued for as

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aforesaid," judgment cannot be rendered by this court against the corporation. He also says that section 28 of the charter of 1857 forbids the common counsel incurring expenditures, unless for previous appropriations. The plaintiff's counsel replies that his client's engagement with the corporation for such advertising was made and the work performed in the years 1864, 1865 and 1866, and before the tax levy was passed or became a law; therefore it (the law of May, 1866) could not act retrospectively as to contracts existing before the law was passed, it being repugnant to section 10, article 1, of the constitution of the United States. And in answer to the next objection, he replies that section 28 of the charter does not and was not intended to apply to such cases as plaintiff's. I have thus given a brief synopsis of the case.

Now how stands the law? Section 7 of the charter declares that "all resolutions and reports of committees, which shall recommend any specific improvements involving the appropriation of public moneys, or the taxing or assessing the citizens of the city, shall be published in all the newspapers employed by the corporation, and shall not be passed or adopted until after such notice has been published at least two days." Section 37 also declares that "it shall be the duty of the clerks of the respective boards to publish all ordinances which shall be passed, and also all other proceedings, in said newspapers, upon the passage of an ordinance which shall contemplate any specific improvement, or involve the sole disposition or appropriation of public property, or the expenditure of public moneys or income therefrom, or lay any tax or assessment, such ordinance shall, before the same shall be sent to the other board, be published with the ayes and noes, and with the names of those voting, in said newspapers, and that such publication shall be a part of the proceedings." Section 38 declares that "all contracts shall be entered into by the appropriate heads of departments, and shall be founded on sealed bids or proposals made in compli-

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ance with public notice, advertised in such of the newspapers of the city as may be employed by the corporation for the purpose, said notice to be published for at least ten days in each of the daily newspapers so employed." Section 41 declares that "persons acquiring any ferry lease, or other franchise or grant, under the provisions of this act, shall be required to purchase, at a fair appraised valuation, the boats, buildings and other property of the former lessees or grantees, actually necessary for the purposes of such ferry grant or franchise. Previous notice of all sales referred to in this section shall be given under the direction of the comptroller in the newspapers employed by the corporation, and for thirty days in each of the daily newspapers so employed." So that it will be seen at once that the charter makes such publication a part of the proceedings of the different boards; and surely the learned corporation counsel will not contend that, because a clause in section 28 declares "that no expenses shall be incurred by any of the departments or officers thereof, whether the object of expenditure shall have been ordered by the common counsel or not, unless an appropriation shall have been made covering such expense," that the corporation newspapers who publish these proceedings, thereby making them valid, cannot obtain a reasonable compensation for their services? For, mark, the common council does not direct the proceedings to be published. The four sections of the charter I have just cited absolutely orders them to be published in the "corporation newspapers," and it therefore follows that it is the charter that incurs the expense, and not the boards of common council. Moreover, it delares that, if the proceedings are not published, the whole shall be void. Indeed, if the construction claimed by the defense for section 28 be the correct one, why the whole proceedings of our city government would come to a stand still, and all the sales for taxes and assessments that have taken place in this city for years past would be void. It is clear, therefore, that section 28 was intended by the legisla-

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ture to prevent extravagant and useless expenditures by the boards, and was not intended to apply to matters of this kind; and as an evidence of the fact that it was not so intended, the learned corporation counsel has cited no authorities showing that my views in the construction of this section are incorrect. On the contrary, I find him consenting, or offering judgment against the corporation for certain amounts incurred for advertising, and the courts uniformly enter up judgments on such consents. On this question I, therefore, hold that, as the charter declares the corporation shall designate newspapers to publish their proceedings, and as said charter also provides that such proceedings, to make them legal and valid, must be published in such newspapers; and it being admitted that the *Daily News* was a corporation paper, it follows, therefore; as a matter of law, that Mr. Wood is entitled to recover a reasonable compensation for such services. Sections 7, 37, 38 and 41 declare that such proceedings, to make them valid, must be published for a certain length of time. Now, the common council does not make the expenditure, but the charter directs it to be made. I think, therefore, on the first point there is hardly a reasonable doubt left against the plaintiff's right to recover.

In regard to the second point, I fully agree with the views entertained by the learned gentleman who represents the plaintiff in the action, in saying that the relief claimed should be granted. Section 10 of said tax law cannot affect the merits of this case, because the engagement was made and the work done before the law of 1866 took effect. The instant the contract with the plaintiff was completed and the work performed, the constitution of the land places the rights under that contract forever beyond legislative control, and it was for that very purpose that the sagacious men who framed the federal constitution introduced the 10th section of article 1 in that instrument. To say that Mr. Wood has performed his work, has fulfilled his obligations in all respects,

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and is entitled in all justice and in equity to his payment, yet the law of the 4th May, 1866, has taken away his remedy by judgment, would be most preposterous. Any statute that takes away or impairs vested rights acquired under existing law, or creates a new obligation, or imposes new restrictions in respect to past transactions, must be deemed retrospective. Such was the rule laid down by Mr. Justice STORY, in *Society agt. Wheeler* (2 *Gallison*, 104). In the case cited, that eminent jurist says: "It is very obvious that the rights of a party under a contract may be destroyed by denying a remedy, or may be seriously impaired by burdening the proceedings with new conditions, so as to make the remedy worthless, and I am quite sure no one will insist for a moment that there is any material difference between a retrospective law declaring a particular obligation void, and one that takes away the remedy to enforce it. Indeed, it is the remedy that protects the rights and enforces the obligations of all contracts, and it was for the protection of that remedy that the clause in the constitution, now under consideration, was mainly intended." In the case of *McCracken agt. Hayward* (1 *How. U. S. R.* 608), Mr. Justice BALDWIN, in delivering the unanimous opinion of the court, said: "The obligations of a contract consist in its binding force on the party who makes it, and this depends on the laws in existence when it is made; they are necessarily referred to in all contracts, and forming a part of them, as a measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate, according to their settled legal meaning when it became consummated. The law defines the duty and the right, and compels the one party to perform the thing contracted for, and gives the other the right to enforce the performance by the remedies in existence. If any subsequent law affect to diminish the duty, to impair the right, it necessarily bears on the obligation of the contract in favor of

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one party, to the injury of the other. Hence, any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the provision of the constitution." Now this very doctrine completely covers the case at bar. Again, Chancellor KENT (1 *Kent's Comm.* 467, note), in discussing this question, lays down as a rule, that "to take away by legislative acts the existing remedies for enforcing obligations of the contract, so as to leave the creditor without redress, would be a mockery of justice, and repugnant to the constitution."

It is, therefore, clear that all suspension by statute of remedies, or any part thereof, existing when the contract was made, is more or less impairing its obligation; and this clear rule of law was held in the case of *Green agt. Biddle* (8 *Wheat. R.* p. 1). In that case, Chief Justice TANEY, in delivering the opinion of the court, says that to deny any remedy under a contract, or by burdening the remedy with new conditions and restrictions, and so make it useless, or hardly worth pursuing, is equally a violation of the 10th section of article 1 of the constitution. And *Blackstone*, in his *Commentaries* (vol. 1, p. 52), says that the remedial part of a law is a necessary consequence of the declaratory; for, says the learned commentator, "laws must be very vague and imperfect without a remedy."

But, apart from all other considerations, and looking at the language of the act, there is nothing therein that makes it applicable to the case under consideration, and we ought with the highest respect conclude that our law makers did not intend it should have a retrospective or injurious effect; because, if the construction contended for be correct, then the legislature might just as well have said that claims similar to the plaintiff's might all be blotted out. This was held to be the true doctrine, in the case of *Danks agt. Quaekensboss* (1 *N. Y. R.* 130; also 1 *Den. R.* 127), and in the case of *The People agt. The Supervisors of Westchester County* (4

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Barb. 70). In the last case, Mr. Justice BARCULO, in one of the ablest opinions in the books, makes this doctrine clear as day. Indeed, authorities sustaining my views are very numerous. I have simply cited a few of the leading cases. Moreover, if the principle contended for by defendant's counsel, in this respect, has a single precedent to warrant it, I must say I have not been able to find it. It is quite true that Mr. Justice GARDINER, an able and a very learned man, in the case of *Danks* agt. *Quackenboss*, in a long dissenting opinion, endeavors to show that the current of authorities in our books is wrong on this subject; but it is quite clear to the mind of the common reader that in his efforts to do so he labors hard and to very little effect. Moreover, the cases cited in his opinion do not touch the question under discussion.

How stands the present case? First, we have the amended charter of 1857, declaring that, to make the proceedings of the common council legal and binding, they must be advertised for a certain specified time in the corporation newspapers. Second, we have the *Daily News* designated as one of such papers, with instructions that it should publish the proceedings of the different boards. Then we have the services performed in 1865 and 1866, and this action brought for the recovery of such services before the law of May 4, 1866, was passed. Now, mark you, all this is admitted in the answer of the defendants; therefore, it is clear, from my reasoning, that section 10 of the tax law, passed May 4, 1866, and passed after the plaintiff's rights had accrued and were vested, cannot act retrospectively so as to affect the plaintiff's rights to recover in this case.

Let an order be entered compelling the comptroller to pay the amount admitted to be due, and a reference be ordered to Enoch L. Lowe, Esq., counsellor at law, No. 56 Wall street, New York city, to ascertain the justice of the balance of the claim.

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NELSON SMITH agt. THE MAYOR, &c., of the City of New York.

Section 10 of the act of May 4, 1866, providing that the mayor, &c., of the city of New York, shall not be liable upon any contract or expenditure, &c., made by any board or officer of the corporation, not expressly authorized by that act, is *unconstitutional and void*, as embracing a subject not contained in the title of the act, and is no answer to an action for services of an attorney performed for the corporation. (*See Wood agt. Mayor, &c., ante, p. 501.*)

Special Term, February, 1868.

MOTION by plaintiff for judgment, on account of the frivolousness of the answer.

NELSON SMITH, *plaintiff, in person.*

DAVID J. DEAN, *for defendants.*

McCUNN, J. By this motion, which is in the nature of a demurrer to a plea, the plaintiff demands judgment as on a frivolousness answer. The ground of the action is a claim for services rendered by the plaintiff, an attorney and counsellor, to the corporation of the city of New York, during the years 1866 and 1867.

The answer propounds for defense, that there is no money in the treasury of the city of New York to the credit of the appropriation for the specific object or purpose upon which the claim set forth in the complaint is founded.

The defendants do not dispute their contract with the plaintiff, nor do they deny that he has faithfully discharged all his obligations under the contract.

The allegations of the complaint are therefore taken to be true, and the only question is as to their sufficiency in law to warrant a judgment for the plaintiff. The answer interposed by the defendants raises a single issue, which is, whether the law of May 4, 1866, commonly called the tax

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levy, be, in respect to the subject in controversy, constitutional and obligatory enactments.

The particular provisions under discussion are in these words: "The mayor, aldermen and commonalty of the city of New York shall not be liable upon any contract made, or expenditure authorized, or liability incurred, by any board, department or officer of said corporation, for any object or purpose which is not expressly authorized by this act, nor for any contract made, or expenditure authorized, or liability incurred, by any board, department or officer of said corporation, for any object or purpose named in this act, beyond the amount appropriated to such specific object or purpose; and no judgment in actions upon contract shall be entered, by default or otherwise, in any court, against said corporation, except upon proofs in open court that the amount sought to be recovered in said judgment still remains unexpended in the city treasury, to the credit of the appropriation to the specific object or purpose upon which the claim sued for is founded."

The contract on which the plaintiff bases his claim appears by the record to have been made before the 4th day of May, 1866, the date of the passage of the law in question, and to have been partially performed before that period. Now, if it were necessary to the decision of this motion, it might be contended, and I think successfully, that the clause in controversy (the act May 4th, 1866), is repugnant to section 10, article 1 of the constitution of the United States, and is therefore, as to the contract in question, void and of no effect. This proposition I have already discussed in *Wood agt. The Mayor, &c.,* decided at special term, June, 1866; and the arguments and authorities adduced in that case need no repetition on the present occasion. I will merely add that the judgment then entered has since received abundant confirmation by all the courts of this city.

But the application before me may be disposed of on another, and, perhaps, more satisfactory, ground. By section

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10, article 3 of the constitution of New York, it is ordained that "no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title." Hence, if a private or local bill embrace more than one subject, that be not expressed in the title, in either event, the bill conflicts with the constitution, and is a nullity. (*The People agt. Hills*, 35 N. Y. 449.)

The title of the tax levy law of 4th May, 1866, is, "An act to enable the board of supervisors of the county of New York to raise money by tax for the use of the corporation of the city of New York, and in relation to the expenditure thereof."

That the tax levy law (the act May 4th, 1866), is a local bill within the effect of the constitutional prohibition, is sufficiently obvious in its very nature. But, in *The Sun Mutual Insurance Company agt. The Mayor, &c.* (4 Seld. 259), we have an express adjudication of the point; for in that case the court of appeals distinctly determined that the "act to enable the supervisors of the city and county of New York to raise money by tax, was a *local bill*." Now, I take it to be apparent, from the term of the title above quoted, that the bill embraces more than one subject; and still more it is evident that, the *subject* involved in this controversy is not expressed in the title. In this view a doubt might be entertained as to the constitutionality of the entire enactment; but for the purposes of this motion, it will suffice to determine the validity of the 10th section, the clause in debate. The true and proper subject of the tax levy law (act 4th May, 1866), is to enable the supervisors of New York to raise money for the use of the city. Whether the *appropriation* of the money so raised, be not a different subject, may admit of serious question. That the particular provision before us (§ 10 of act May 4th, 1866), whereby the general law of the state is repealed *pro-tanto*, and the established rules and practice of the courts essentially modified—that this important provision constituting a substantive and independent *subject*, different in nature and object from the characteristic

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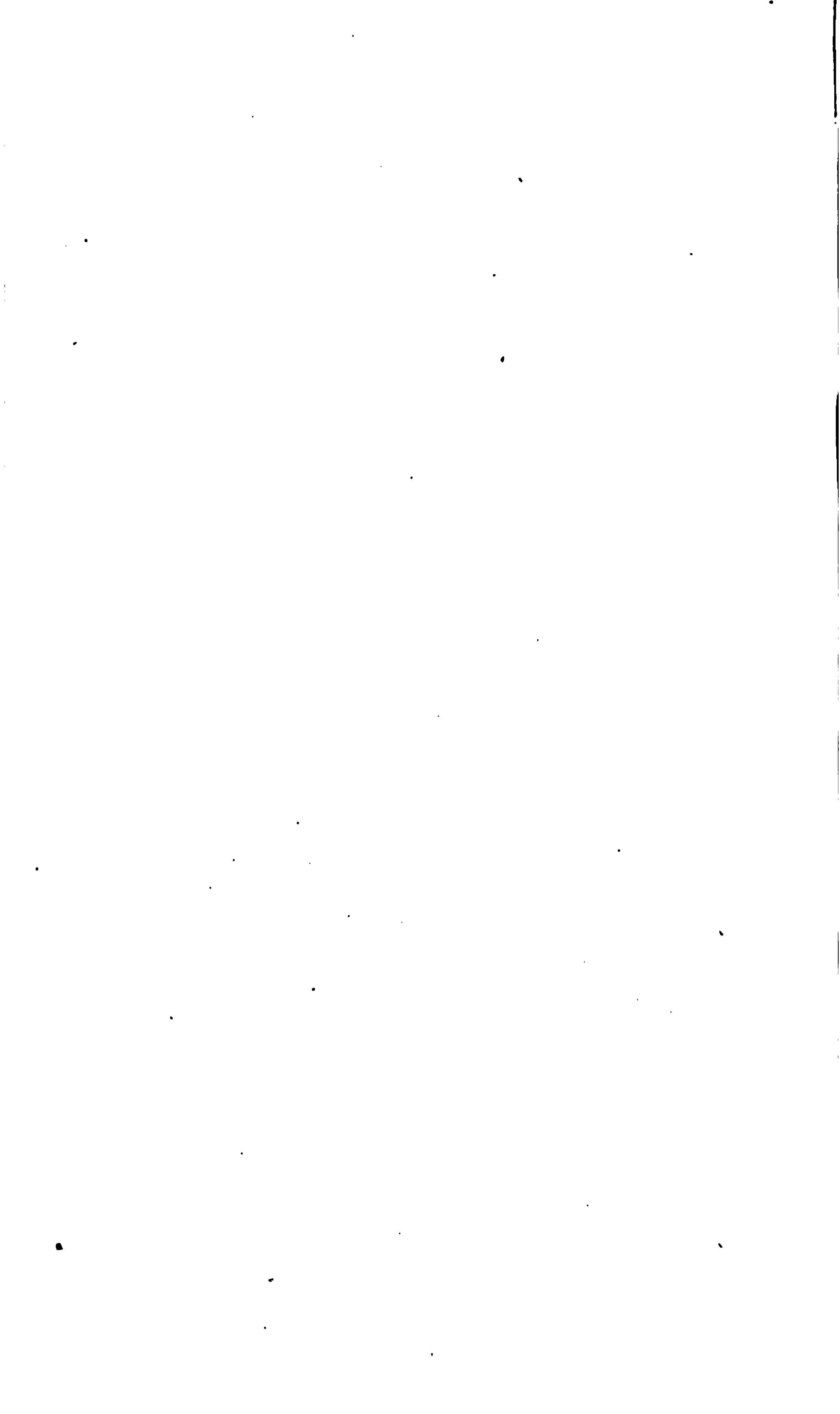
purpose and import of the bill, is too plain for judicial discussion. Nor, is it less evident and indisputable, that this special and exceptional subject is not "expressed in the title of the bill." Embracing more than one subject; and the subject involved in this motion, not being expressed in the title; the bill is inoperative; at least as to that subject, which is foreign to the legitimate scope and object of the enactment. *The People* agt. *McCann* (16 N.Y.R., 60); *Williams* agt. *The People* (24 N.Y.R., 405); *The Mayor, &c.* agt. *Colgate* (2 Kern., 146; *Sun Mutual Insurance Company* agt. *The Mayor* (*vide supra*). In this last case Mr. Chief Judge DAVIES, employed the following language: "It would be impossible to devise a title more calculated to mislead or throw off suspicion or inquiry, as to the real subject of the act. To sanction such a procedure would be to override and nullify a clear, plain and mandatory provision of the constitution.

I cordially approve of the language of a member of the court for the correction of errors (4 Hill, 418), where he said: "To maintain the constitution is our first duty, and if the legislature has, for any cause, encroached upon that sacred instrument, or if any erroneous construction has been given to it, we are imperatively called upon to declare its meaning, and to assert its supremacy." I hold, that section 10 of the act May 4th, 1866, being unconstitutional and void; affords no answer to the present action.

The plaintiff must have judgment.

ERRATA.

In the case of *Kimberly* agt. *Parker*, ante, page 280, in the first paragraph, for the word "pre-eminently," read prominently; and in the second paragraph, near the bottom, for the word "created," read enacted.



DIGEST
OF THE
POINTS OF PRACTICE,
AND
OTHER IMPORTANT QUESTIONS,

CONTAINED IN THE FOLLOWING REPORTS:

34 *Howard's Pr. R.*; 48 *Barbour's R.*; 36 *N. Y. R.*; and
2 *Robertson's R.*

ACCOUNT STATED.

1. The plaintiff claimed to have left a draft with a bank for collection, on the 24th of July, 1856. His bank book was written up as early as August or September, 1856, and balances were struck and the vouchers delivered up to him repeatedly, afterwards, until 1859, when he drew out of the bank the balance remaining to his credit. In September, 1856, he knew, or with reasonable attention might have known, that the draft was not credited to him on the books of the bank; yet he omitted to bring the matter to the notice of the bank until the spring of 1862. *Held*, that this was a *stated account*, not objected to within a reasonable time; so clearly so, that it was not, under the evidence, a question proper for the consideration of the jury, whether the delay was sufficiently accounted for. (*Hutchinson agt. The Market Bank of Troy*, 48 *Barb.* 302.)

2. *Held*, also, that the judge properly refused to charge that, under the circum-

stances, the plaintiff was *absolutely and conclusively* bound by the stated account, and could not recover of the bank the amount of the draft. The true rule in such cases is that the stated account is conclusive upon the parties, unless the plaintiff is able to impeach it by showing affirmatively fraud or mistake. (*Id.*)

3. A stated account never gives to a party claiming under it the benefit of an absolute *estoppel*. In practical effect it gives to him little more than these two advantages: 1. When the question arises upon the pleadings, the court has, in some instances, in granting permission to amend or reply, some equitable control over the power of opening accounts; 2. When the question arises upon the trial, the party impeaching the account has the affirmative of the issue, and the burden of proof. (*Per Hoëboom, J.*) (*Id.*)

ACTION.

1. In an action against the officers of an

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incorporated company, for selling to plaintiff certificates of stock, representing stock which had been fraudulently over-issued by them, to entitle the plaintiff to recover, he must prove to the satisfaction of the jury that the certificates purchased by him did not represent genuine stock. (*Bruff agt. Mali*, 36 N. Y. R. 200.)

2. Where the plaintiff had proved that the whole amount of stock which the company were authorized to issue had been issued prior to the issuing of his certificates, the burden of proof is thrown upon defendants to show definitely that the certificates sold to plaintiff represented genuine stock. (*Id.*)
3. Where an action for malicious prosecution has been instituted, and prosecuted to final judgment, an action for slander for uttering the words in commencing the malicious prosecution will not lie. (*Rockwell agt. Brown*, 36 N. Y. R. 207.)
4. Where the accusation in the two cases is identically the same, the prosecution and judgment in the one case will be a bar to a prosecution in the other. (*Id.*)
5. But if they relate to different utterances, although alluding to the same general accusation, it is otherwise. (*Id.*)
6. For damages occasioned by a mob; plaintiff's assignor kept a bawdy house, which provoked the mob, etc.; not good as a defense. (*Ely agt. Supervisors of Niagara County*, 36 N. Y. R. 297.)
7. An action does not lie to recover personal property, subject to execution, from an officer who holds it under a tax warrant against the plaintiff, regular upon its face, and issued by the proper authorities. (*Hudler agt. Golden*, 36 N. Y. R. 446.)
8. When a public statute is remedial in its nature, it should be construed liberally, with a view to the beneficial ends proposed. (*Id.*)
9. In no case, after action brought, will it abate by the death of the plaintiff, if the cause of action be such that it might have been prosecuted by the executor or administrator of the party. (*Potter agt. Van Vranken*, 36 N. Y. R. 619.)
10. May recover for testator's goods wrongfully taken during life time of testator. (*Id.*)
11. Land was conveyed by the defendant to the plaintiff, by an absolute conveyance, but upon an undertaking to sell the same for the defendant's benefit, and to pay the proceeds over to him. The plaintiff having sold the farm and

received the proceeds, it was held, that he could not evade responsibility therefor to the defendant, because he had never manifested any "trust in the land in writing subscribed by" him. (*Walcott agt. Ronalds*, 2 Robt. 617.)

12. A liability to pay over the proceeds of such sale may arise, in such a case, if warranted by the evidence, not from any relation of trustee and *cestui que trust*, but from the promise, supported by a sufficient consideration not affecting the land, but binding only on the person of the grantee. (*Id.*)
13. No privity is created between a party who has paid money to another person as belonging to the latter, and a third person to whom the latter has voluntarily paid it (either as an individual or as an officer of a court), without impressing on such last payment any specific character or condition; and any separate liability of the parties paying and receiving to each other remains the same as before. (*Getty agt. Campbell*, 2 Robt. 664.)
14. Although the sum in question should be paid to and received by the defendant, as a receiver of a court, he is not bound to investigate the liability to pay it of the person paying it. Having received it unqualifiedly, in such official capacity, he cannot (according to the order of that court, as an officer of which he received it), part with it; otherwise he would be responsible to the parties entitled to it. If paid to him under a mistake, the court can alone order it to be refunded, when it may be used to reimburse the plaintiff. (*Id.*)
15. A right of action to recover damages for the fraudulent misapplication or conversion of property by an officer or agent of a banking association, is assignable, and an action can be maintained by the assignee. (*The Grocers' National Bank agt. Clark*, 48 Barb 26.)
16. Such a right of action is assignable when the wrong is committed against a banking association, equally as if the property of an individual was thus misapplied or converted. (*Id.*)
17. The attribute of assignability is not confined to rights of action belonging to natural persons; it extends with equal effect to those belonging to artificial persons. (*Id.*)

ADJOINING OWNERS.

1. In the absence of any agreement between owners of adjoining lots, for a party wall or easement, or uninter-

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rupted user as such by one, of a wall built on the lot of the other, the fact that the former, in building upon his lot, has inserted his beams in such wall, if done without permission of the other, will not entitle him to an injunction to restrain the latter from taking down such wall. (*Roberts agt. White*, 2 Robt. 425.)

2. A mere license from the party in whose walls such beams were inserted, to the other, to hang window shutters upon such wall, is not a ratification of the act of inserting beams in it. The mere request for such a license, and an agreement that the party applying will brick up the opening whenever requested, is a recognition, rather than an exclusion, of the rights of the owner of the wall. (*Id.*)

ADMISSIONS.

1. The admissions of one party, whether sworn to or otherwise, in regard to partnership matters, are always proper to charge his co-partners; and it is immaterial whether they appear in a sworn statement, or were orally given, or were testified to under oath, by such partner as a witness on the stand. To render the admission competent, however, it must appear, *by other evidence*, that a co-partnership existed at the time to which the admission refers, or in respect to which it is supposed to relate. (*Fogerty agt. Jordan*, 2 Robt. 319.)

AFFIDAVIT.

1. In granting an order to compel a party to make an *affidavit* to be used on a motion, under section 401 of the Code, the judge must be satisfied by competent and sufficient proof: *First*. That the party applying for it intends to make or oppose a motion; and, *Second*. That it is necessary for him, in making or opposing such motion, to have the deposition of some person who refuses to make a voluntary affidavit. (*Moses agt. Banker*, ante, 212.)
2. It is usual to take the affidavit of the attorney applying for the order, as competent and sufficient proof of these matters. (*Id.*)
3. But where it appears from the affidavit upon such application that the motion intended is merely to make an *answer more definite and certain*, or that the person whose deposition is required is *incompetent*, or that the real object of the applicant is, under the guise of a motion, to obtain an examination which

he otherwise could not get, the court is bound to refuse the order. (*Id.*)

4. Such an *ex parte* order affects the right of the opposite party, which authorizes him to move to set it aside, as he has a right to attend on the examination with his counsel and to cross-examine; and besides such attendance subjects him to trouble and expense, (*Id.*)
5. The order in this case set aside, on the ground that it appeared from the pleadings and papers that it was not intended for the legitimate purpose of obtaining depositions to be used on a motion, but for some other purpose; such, perhaps, as enabling the plaintiff to ascertain what line of proof it will be necessary for him to prepare to meet on the trial (*Id.*)
6. Besides, the plaintiff had waited before making his application until his cause had been twice called for trial, and it could have been tried on its merits sooner than the motion could have been determined. (*Id.*)

AGREEMENT.

1. Where a person, under an agreement to purchase two lots of land, subject to the payment of a certain mortgage thereon, and to build a building on each lot, at a certain time and under certain conditions, upon the performance of which he is to receive a deed in fee of the premises; and after the buildings are partially built, he, by fraud and misrepresentation, induces the mortgagors to release one of the lots, without any consideration therefor; a court of equity will restore the mortgagee, as far as possible, to his former condition as to the security, by decreeing that the purchaser pay in money to the mortgagors one-half the amount of the mortgage, although the purchaser alleges that the remaining lot and building are ample security for the whole mortgage money. (*Siebbins agt. Howell*, ante, 83.)
2. Where the defendant, for a valuable consideration, sold to the plaintiff all his stock in trade, fixtures, boxes, horses, wagons, &c., and all the right, interest, privileges and advantages acquired and possessed by him for the prosecution and continuance of the business of peddling and selling a certain kind of tobacco, &c., upon a certain described route, embracing the cities of Albany and Schenectady, and villages of Greenbush, &c.; and covenanted and agreed that he would not in any manner interfere with, hinder or obstruct the plaintiff in the prosecution

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of his said peddling business in the district, or over the route, at or about the places mentioned, and that he would not do or say anything to his old customers to discourage or hinder the plaintiff in the said business:

3. *Held*, that it was a violation of this agreement, for which an injunction would lie, where the defendant started the same business of pedling and selling tobacco, &c., in the same district and vicinity, although he acted as agent, and sold other tobacco besides that which the plaintiff sold. Neither as principal or agent, had the defendant a right to interfere with or to obstruct the plaintiff in the prosecution of the business he had transferred to him. (*Ewing agt. Johnson, ante*, 202.)
4. Such agreement is not void as being in restraint of trade, as the restraint is not unreasonable, applied to such a district or territory. (*Id.*)

5. In an action by the plaintiffs to recover their commissions as shipping brokers, for negotiating a charter of the defendant's steamer to and by the constitutional government of Mexico, the plaintiffs produced at the trial a paper signed by the defendant, headed "Memorandum of the conditions of charter of the steamship M.," which they claimed to be an agreement finally concluded between the parties. The defendant insisted that it was only a memorandum, from which a charter-party was to be drawn, and that no charter-party was in fact executed. The judge charged the jury that, if the memorandum was considered by the parties as an agreement between them, leaving no further agreement to be made or drawn, and no new provision to be incorporated in it, but was signed by them as containing the whole of what they agreed to, it was binding, and the plaintiffs became entitled to their commission. If there was nothing more to be done than to have duplicate copies of such paper made and signed, the agreement was concluded; but if it was merely a memorandum containing conditions to be embodied in a charter-party to be afterwards drawn up and signed, and such instrument was understood between them not to be delivered, and that there was to be no binding agreement between them until such future paper was drawn up and executed, then the negotiation was not concluded, nor the commissions earned. *Held*, that the law was correctly stated in the charge, and that the conflicting evidence warranted the submission of the questions of fact embraced in it to the jury. (*Jewett agt. Emerson*, 2 Robt. 165.)

6. *Held*, also, that this disposition of the case met any claim for customary commissions on the ground of the completion of the agreement, and also disposed of the question of any prior agreement by the defendant (if made) to pay five per cent commissions to the plaintiffs, if the chartering should be completed, as it left the question of the completion of the bargain in each case to the jury. (*Id.*)
7. A contract of sale of merchandise, which is deficient in a description of the article, its price, time of delivery and payment, if not forthwith to be delivered and paid for, is not binding. (*Stock-er agt. Partridge*, 2 Robt. 193.)
8. An oral understanding cannot, under the statute of frauds, be incorporated in a written agreement. (*Id.*)
9. A written document, whether subscribed or not, cannot be imported into a writing or correspondence, duly subscribed, so as to charge the parties unless the reference to it in such correspondence or writing be free from all doubt. No amount of verbal evidence, however apparently conclusive, can so far engrave one written document on another as to constitute one contract in writing subscribed by the parties, within the provisions of the statute of frauds; unless there be such a description of the document referred to, in that referring to it, as to enable the court by their simple inspection to determine that the former was intended by the letter. The moment recourse is had to verbal evidence to determine what was the document referred to, the entire contract ceases to be evidenced by writing. (*Id.*)
10. In an action upon an alleged contract of sale by the vendor, the only adoption of any bill rendered, in any contract created by the correspondence between the parties, was by the reference to one in the first two notes passing between the parties, on the 24th of November, and two of the vendor's on the 29th. In the first of the former, the defendant said: "On bills rendered you say cash on Wednesday the 26th;" and the vendor, in his reply, spoke of "the payment of the bill rendered on Saturday." In the other two written by him, he spoke of "my bill sent you," and "paying the oil bill." From the rest of the correspondence, it was only to be gathered that "two hundred and fifty barrels," containing an undefined quantity of some kind of refined oil of a standard gravity and test of heat, bought by the vendor of the "Genesee Oil Co.," in his own name, and paid for by him, they

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- knowing him alone, and not the defendant, in the transaction; which they delivered to the vendor, had been sold by the latter, as a broker, to the defendant, for some price to be paid on the 29th of November, or earlier, if possible. No mention was made anywhere in the correspondence of the sold note. *Held*, that there was no such reference, in the correspondence to the bill rendered, as to make its terms a part thereof; and that the terms of the contract, so far as they were in writing, were still left indefinite. (*Id.*)
11. A broker, having a quantity of merchandise for sale for his principal, at a limited price, agreed with another person to pay him a portion of the profits on its sale, without specifying what portion. He subsequently agreed with a third person that the latter should sell the merchandise, and that they should divide whatever price was received over and above the sum fixed by the principal as such. *Held*, 1. That the agreement between the broker and such first person was void for uncertainty in not specifying the portion of the profits to which the latter was to be entitled. 2. That such first person had such an *interest* in the subject matter of an action brought by such third person, against the broker, to recover one-half of the profits of the sale of such merchandise, as to render him either a necessary or proper party to it. (*Verby agt. Kirkpatrick*; *2 Robt. 227.*)
12. A contract having been shown to have been once executed, the presumption of law, in the absence of any finding that it has been rescinded, is that it is still a subsisting agreement. (*Meyer agt. Hallock*, *2 Robt. 284.*)
13. A claim by one of two contracting parties, that a departure from the contract by the other operated to cancel it, when the other denies that such an effect was produced, does not amount to a rescission. (*Id.*)
14. A rescission puts an end to the contract *in toto*. After a contract has been rescinded, a party cannot, of his own motion, proceed under it to finish a portion of the work agreed to be done by him, so as to acquire any rights under it. (*Id.*)
15. Upon a contract by one person to build nine houses for another, the former, upon a refusal by the latter to permit him to build three of the houses, has a right to rescind and put an end to the contract; but if he elects to go on and finish the other six houses, he does not entirely rescind it. (*Id.*)
16. If the contractor, in such a case, continues a negotiation with the other party for several months, while progressing with the work, he does not waive all right to abandon the contract as to the six houses. (*Id.*)
17. A party intending to abandon a contract while in *fieri* must act promptly and decidedly, on the very first discovery of a breach. If he negotiates with the other party afterwards, and goes on with the work, he waives all right to abandon for the breach complained of. (*Id.*)
18. An alteration of or departure from some of the terms of a contract, does not *per se* operate as a rescission of the whole. (*Id.*)
19. Where work has been done under a special agreement between the parties which has not been rescinded, the party performing the same cannot recover therefor under a *quantum meruit*, in disregard of such agreement. (*Id.*)
20. An agreement for the sale of goods of the value of \$50 or more, is not valid unless in writing, and signed by both parties to the contract. (*McCunn, J. dissented.*) (*Justice agt. Lang*, *2 Robt. 333*)
21. A court of equity has power to give relief, where there has been a mistake or omission in a written agreement, and may, in a proper case, conform an agreement to the expressed intent of both parties. (*Pennell agt. Wilson*, *2 Robt. 505.*)
22. In such cases, parol evidence of the agreement or intent of the parties is admissible to prove that, by mistake, something material has been omitted in the written contract, or that it contains more than was intended, or that it varies from their common intent, by expressing something different in substance from what was intended by both. (*Id.*)
23. Although the power of a court of equity to give relief in such cases is unquestionable, it is to be exercised with great caution; and unless the mistake is clearly made out by proof entirely satisfactory, the court will withhold relief, upon the principle that the written paper ought to be treated as a full and correct expression of the intent of the parties, until the contrary is established beyond reasonable controversy. (*Id.*)
24. A mistake of the law, by the attorney of one of the parties to an agreement, only, or a misapprehension of the agreement by the party whose attorney he

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- was, is not sufficient to justify the reformation of the contract. (*Id.*)
25. A contract for the sale and purchase of land was made on the 1st day of July, 1863. By its terms, the deed was to be delivered and possession given on the 1st day of November, 1863; and the premises were to be conveyed free from all incumbrances, "except the party of the second part to pay proportion of the taxes for the year 1863, from November 1, 1863." *Held*, that in view of the fact that the taxes to be paid were those imposed for the year 1863, without reference to the time of confirmation, the plain construction of this clause was that the purchaser was to pay in the proportion of one-sixth of the amount, being the proportion which the period of time from November 1, 1863, to the end of that year, would bear to the whole of that year; and that, unless the evidence was clear, distinct and preponderating, that the written agreement did not express the meaning or intention of the parties, such instrument must prevail. (*Id.*)
26. *Held*, also, that the equity was wholly with the purchaser; for it would be unconscionable to compel him, without the clearest proof of his agreement, to pay the taxes from January to July, for six months prior to his contract, and from July to November, while the vendor had the use and occupancy of the premises in question. (*Id.*)
27. On the 9th of July, 1862, the defendants agreed to sell the plaintiff's 250 barrels of alcohol of a designated strength, to be delivered "under the tax law," from the 20th to the 31st of August, 1862, duty paid, at forty-five cents a gallon. Parol evidence was adduced to show that the parties understood the meaning of the words "under the tax law," in the contract, to be, that the alcohol was to be manufactured under the tax law then in existence, and which by its terms was to go into effect on the 1st of August; and that the alcohol would be deliverable after the law would take effect, and thereby become duty free. By a provision in such tax law, the secretary of the treasury was authorized to suspend its operation; and on the 30th of July he did suspend it until September 1, the effect of which suspension was to subject alcohol manufactured before the law went into operation to the duty previously imposed upon that article. *Held*, that this was not an act of the law which rendered performance impossible, so as to excuse the sellers. That it was not impossible to deliver alcohol of the quantity and quality mentioned in the contract, whether manufactured under the law or before the law was in operation; and that the sellers must abide by their agreement, and either do the act or pay damages. (ROBERTSON, *Ch. J., dissenting.*) (*Baker agt. Johnson, 2 Robt. 570.*)
28. The performance of a contract is excused when it has become impossible by the act of God, or of the law. In all other cases of failure to perform, from whatsoever cause, the defaulting party is answerable in damages. (*Id.*)
29. On the 4th of November, 1864, the plaintiff, by a written contract called a sale note, sold to D. one hundred bales of cotton, quality even middling, at fifty-nine cents, "to arrive," for cash on delivery. On the 18th of December twenty-one bales of the cotton arrived, of which notice was given to S., the purchaser's agent, who selected nine of them as even middling, obtained possession of them, and sent them to the warehouse of the defendant, with directions to store the same, as the property of the Atlantic Delaine Company. Payment was claimed by the plaintiff to have been demanded, at the time the cotton was delivered to S., and refused. It was not pretended that the Atlantic Delaine Company paid or parted with any consideration for the cotton. But it appeared that the same was deposited with the defendant for the benefit of the company, in part fulfillment of a contract which D. had entered into with them, to deliver to them 200 bales of cotton on arrival. *Held*, 1. That, although the Atlantic Delaine Company received the nine bales in question under their contract with D., and credited him therewith, yet, as they had paid nothing for the cotton, they could not be protected as *bona fide* purchasers, against the plaintiff's lien, unless the plaintiff was originally not entitled to, or waived payment on delivery. 2. That either vendor or vendee could have regarded the contract between them as an entire contract. The cotton was "to arrive;" and until the whole of it should arrive, the one was not obliged to deliver, or the other to receive, any portion of it. 3. But that as D., the purchaser, did receive the nine bales, he was bound to pay for them on delivery, unless the vendor waived this condition of the contract. 4. That a waiver could be effected either by express assent, or by acts, such as an unreasonable delay in demanding payment, or in not demanding it at all. 5. That the testimony upon the question of an express waiver being conflicting, it should have been left to the jury; and that the judge

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erred in taking it from them, and in refusing to admit evidence bearing upon that question. (*Matthews agt. Hobby*, 48 Barb. 167.)

30. The law will not imply a promise to pay for board or services, as among members of the same family, and persons more or less intimately or remotely related, where they are living together as one household, and nothing else appears. (*Wilcox agt. Wilcox*, 48 Barb. 327.)

31. By the terms of a contract between the parties, the plaintiff sold, and the defendants purchased, "two boat loads western mixed corn, in B.'s store, Clinton wharf, ex boats Spencer and Galt, at 89 cents per bush. of 56 lbs., in store No. 1, bins 3, 4 and 5." Six boat loads of corn of the same quality and description had been placed and mixed together in those bins, previous to the sale, four of which had been sold. It was proved that it was customary, in selling by the boat load, to designate the boats from which the corn was received into the store, for the purpose of fixing the quantity; that corn from each boat was weighed, when received, and mixed with other corn of the same quality, and the name of each boat, and the quantity it contained, was marked upon the bins; so that, in selling a specific boat load, the quantity and quality only were represented, and not the identity of the corn brought by such boats. The sale was by sample, taken from these bins, and the bulk in the bins was inspected by the defendant's agents, compared with the samples, and found satisfactory. The bins 3, 4 and 5, when filled with the six boat loads, had burst on one side, and about one hundred bushels of the corn had fallen into the passage way, whence it was removed temporarily to the front side of another bin, in the rear of which was some other corn; the two parcels being separated by a partition, and not coming in contact with each other. The same identical corn so removed was afterwards returned to the bins from which it had been taken. *Held*, 1. That, although the defendants purchased by sample from the bulk of the corn in bins 3, 4 and 5, they had not purchased the identical corn taken into the bins from the boats Spencer and Galt. That the words "ex boats Spencer and Galt" were not necessarily, in the light of the evidence, a guaranty that the corn was taken from those boats. 2. That there being no means of determining from the face of the broker's bought and sold notes that these words indicated the quantity or quality of the corn, there

was, in this respect, a latent ambiguity, and evidence was properly received in explanation. 3. That the judge was correct in refusing to charge that the defendants had purchased some particular boat load of corn, or that the contract did not mean the quantity and quality of corn brought by the particular boats. 4. That there being no proof that other corn was mixed with that sold, the testimony did not warrant the submission by the judge of the proposition that the defendants had purchased a specified bulk of corn in certain bins, and if other corn was mixed with it, that he could not recover. 5. That an instruction to the jury that the defendants were bound to receive the corn, if it were of the same quality and quantity with that contained in the boats Spencer and Galt, and that it was not material that it was not in the bins 3, 4 and 5 at the time of the contract, was not to be understood as an instruction that upon a sale of a particular article, another, of the same quality and quantity, must be received in fulfillment of the contract, if tendered for that purpose. That such a rule could not be sustained, although it might be impossible to appreciate, in damages, the actual difference. 6. That the plaintiff having tendered the corn, by offering to transfer the storage receipt therefor, there was no ground for the pretence that the offer to deliver was not of the same corn which was sold, as understood and intended by both parties. (*Hay agt. Leigh*, 48 Barb. 393.)

32. By a written agreement dated November 29, 1862, the defendants agreed to sell to the plaintiff four hundred cords of white pine wood, to be delivered on or about the 1st of May, 1863, and that no part of the delivery should be later than November 1, 1863, the same to be paid for cash on delivery. The plaintiff agreed to pay for two hundred cords at the rate of \$5.25 per cord, and for the other two hundred cords at \$5 per cord. About one hundred and fifty-five cords were delivered under this contract, and payments made therefor to the amount of \$788, between August 1 and September 1, 1863, when the defendants refused to deliver any more. *Held*, 1. That the contract was for the delivery of, and payment for, four hundred cords of wood as an entirety, half the quantity being at the higher and half at the lower price. 2. That the contract was to the effect that the defendants would deliver, on or about May 1, and that no part of the delivery should be later than the 1st of November; the payment to be cash on delivery. 3. That the agreement was not for payment as the wood

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was delivered, but required the full performance of the delivery agreed on, before payment could be demanded. 4. That the contract gave the defendants the whole season, from May 1st to November 1st, to deliver the wood; and if it was delivered within that time, the plaintiff was bound to accept and pay for it. 5. That it was not the one half, or the other, that was to be paid for at the greatest price; but the prices named covered the whole quantity. 6. That the plaintiff committed no breach of his contract by refusing to pay any more than \$5 per cord, because the defendants were not in a condition to demand anything; nor could such refusal be deemed a refusal to take any wood and pay for any part at the highest rate named in the contract. 7. That the judge erred in holding that the delivery of one hundred and fifty-five cords was too late to be applied on account of the two hundred cords which was to have been delivered on or about May 1st; and also in leaving it to the jury to say whether the delivery was in season, and if not, that the defendants were entitled to be allowed only at the rate of \$5 per cord. 8. That the plaintiff having accepted the one hundred and fifty-five cords as a delivery under the contract, the jury should have been instructed, in estimating the damages, to allow the defendants for one-half of the wood at the larger price, and the remainder at the lower price. (*Williams agt. Sherman, 48 Barb. 402.*)

38. E. agreed to sell and convey to the defendant a house and lot for the price of \$10,500, subject to the payment of a mortgage thereon for \$5,000, which the defendant assumed as a part of the purchase money, and agreed to pay the residue, \$5,500, in ready made clothing. E. was to convey the property free from all incumbrances, except the said mortgage. There being taxes to the amount of \$278.24, which were a lien on the property, and E. being unable to furnish the money to pay said taxes, it was stipulated by a written agreement between the parties that the defendant should retain \$650 worth of the clothing, at the invoice price, upon the condition that if E. should pay the taxes within one month from that date, the defendant should deliver the said clothing to E.; but if not paid within the time, then the defendant should have a right to pay such taxes, and appropriate the clothing so retained to his own use, as his indemnity and remuneration for such payment, without accountability therefor. Clothing to the amount of \$650 was accordingly selected by the defendant

and retained for the above purpose, the balance of the clothing delivered to E., and the conveyance of the property closed. E. failing to pay the taxes within the time, the defendant paid them, and appropriated the clothing to his own use, claiming that the same was forfeited. In an action brought against him by the assignee of E., for the conversion: *Held, 1.* That the facts did not present the case of a *pledge*, it being of the essence of such a contract that the thing should be delivered as a security for some *debt* or *engagement*; and that it not appearing that the taxes were assessed against E., or that she was in any manner *liable for the payment thereof*, there was no engagement of E. to which the clothing could attach as a *pledge*. *2.* That the agreement should be regarded as a modification of the original contract of sale, whereby the defendant agreed to take the real estate subject to the taxes, and pay therefor \$650 less, in clothing; and gave to E. the option or privilege of acquiring the benefit of the original bargain, by paying the taxes within one month. *3.* That an action would not lie against the defendant for the conversion of the goods, and that the plaintiff was therefore properly non-suited. (*Hale agt. Hays, 48 Barb. 574.*)

34. Under a contract to deliver petroleum oil within a specified time, not to the purchaser personally, or at his place of business, but "*to lighter*," a tender on the evening of the last day is sufficient. It will be inferred that the parties intended, when they entered into the contract, that the buyer should send a lighter to receive the oil; and if he neglects to furnish, or willfully withholds, the means requisite to enable the seller to deliver the oil within the contract time, he is in default. (*Ketcham agt. Hiller, 48 Barb. 596.*)

35. Under such circumstances, the tender need not be made early enough within the contract time to enable the buyer to examine and accept the oil prior to the expiration of the time specified in the contract. (*Id.*)

36. A proposition made by one party, by letter, to another party, at a distance, containing a specific offer, which is unconditionally accepted by the latter, will constitute a valid contract between them. (*Myers agt. Smith, 48 Barb. 614.*)

37. A bargain thus evidenced is to be deemed closed when nothing mutual between the parties remains to be done to give either a right to have it carried into effect. (*Id.*)

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38. From the moment when the minds of the contracting parties meet, signified by overt act, the contract is obligatory. And whatever amounts to the manifestation of a formal determination to accept an offer of a contract of sale, communicated to the party making the offer, is an acceptance which will bind the bargain. (*Id.*)

39. But where the letters of a person proposing to purchase indicate that an interval is meant to be provided for, during which the property is to be held by the owner until the former can examine it, and determine in what manner it shall be disposed of; and the conduct of the purchaser lends confirmation to that conclusion, as by his going to the vendor's place of business without funds to pay for the property, and without any arrangement to procure funds for that purpose, and without providing any means of taking away the property; this will not be deemed an executed and completed *contract*, mutual in its obligation, but merely a *negotiation* inchoate and unperfected. (*Id.*)

40. An acceptance of an offer made by letter must be in the words of, or must be entirely accordant with, the terms and conditions of the offer, to bind the party who makes the proposition. (*Id.*)

41. Thus, where an offer was to sell malt "delivered" on the boat at W., and the acceptance was of the malt "deliverable" on boat: *Held*, that this was a manifest variance from the terms of the offer. (*Id.*)

42. Though an offer and demand of performance may be necessary to atone for an apparent laches, and to put the other party in default, yet they assume the existence of a contract of which the party offering and demanding has a right to require the performance, and they have no effect where there is no existing and obligatory contract to which they may be referred, and to which they are a necessary supplement. (*Id.*)

AMENDMENT.

1. If the facts proven on the trial establish a cause of action, the court may allow the *complaint* to be amended. (*Code*, § 173.) In the like case, the court may conform the *pleadings* to the facts proved. (*Meyer agt. Fiegel, ante.* 434.)

2. The power to amend a pleading, or to conform it to the facts, is *discretionary*; but it may be exercised in the cases and under the limitations contained in said

section (173). If, therefore, on the trial, the defect in the complaint is supplied by proof, the objection may be overruled. (*Id.*)

3. Where, on the trial, evidence is offered, before a motion is made to dismiss the complaint, which may overcome the objections to the complaint, rendering it proper in the discretion of the court to allow an amendment or to conform the pleadings to the facts, it is error to reject such evidence. (*Id.*)
4. An application for leave to *amend a pleading* on the trial is always addressed to the discretion of the court, and, if denied, is not the subject of appeal or review. (*Dennis agt. Snell, ante*, 467.)

ANSWER.

1. An *order extending time to answer*, supersedes a prior motion noticed to strike out portions of the complaint, where there is no reservation in the order of the right to make such motion. (*Marry agt. James, ante* 238.)
2. An *answer* is good which states as follows: "The defendant answering the complaint, in this action, *says*, he denies each and every allegation contained in the complaint." The word "*says*" he denies, &c., does not make the answer frivolous. (*Chapman agt. Chapman, ante* 281.)
3. Where, however, the complaint contains an averment that the property is exempt from execution, the defendant is not compelled to set up in his answer the *non-exemption of the property*, or be excluded from proving it on the trial, merely because it is averred in the complaint. It is an immaterial allegation, which it is not necessary to deny. (*Dennis agt. Snell, ante* 467.)
4. If the sheriff relies entirely upon the *execution* in taking property, it is sufficient for him merely to set forth the writ; but if he desires to go beyond the execution, and inquire into the *consideration of the judgment* upon which the execution is issued, he must plead the *judgment*, and set it forth in his answer. (*Id.*)
5. The negation of a fact, simply because the party has not enough information to have any belief about it, is not equivalent to stating information and consequent belief that such fact does not exist. (*Per ROBERTSON, Ch. J.*) (*Ryder agt. Jenny, 2 Robt.* 56.)
6. Whatever objections to a complaint a defendant, by answering, waives, he

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does not waive the objection that it does not state facts sufficient to constitute a cause of action. (*Gray* agt. *Palmer*, 2 Robt. 500.)

7. In actions for the wrongful taking of personal property, the time of the taking is not essential, provided it be before the commencement of the action. When a day certain is averred in the complaint, it is sufficient for the defendant, in alleging title in himself, to state that he became the owner at or prior to such day. The precise day is not necessary to be stated; if it were, it is enough if the answer allege that the defendant, at the time stated in the complaint, and for a long time prior thereto, was the owner. (*Bryant* agt. *Bryant*, 2 Robt. 612.)
8. Under such an answer, the defendant would be permitted to prove ownership at any time before suit brought. And any erroneous averment could be corrected or disregarded. (*Id.*)
9. Defenses in an answer will not be stricken out for redundancy, unless they are obnoxious to that charge by their verboseness and repetitiousness. (*Maretzke* agt. *Cauldwell*, 2 Robt. 715.)
10. The statement of mitigating circumstances in an answer, although set up as a defense to an action for a libel, does not thereby render it a pleading, so as to be liable to be required to be made more definite and certain. Its sufficiency as a notice must be determined on a trial. The cases of *Graham* agt. *Stone* (6 How. Pr. 15), *Brown* agt. *Orris* (*Id.* 376), and *Newman* agt. *Otto* (4 Sandf. S. C. R. 669), approved of, and the authority of *Bush* agt. *Prosser* (11 N. R. 347), upon that point, doubted. (*Id.*)
11. The defense of a defendant who justifies such a libel is sufficiently definite and certain, without stating the names of improper persons who he charged frequented the plaintiff's exhibitions, where he states them to be unknown to him. (*Id.*)
12. Whether a defense of a defendant, justifying such a libel, is sufficiently definite and certain, where he does not give the names of agents of the plaintiff, and subscribes to his exhibition, whom he charges with furnishing such improper persons with tickets of admission. (*Quere, per McCunn, J.*) (*Id.*)
13. Denial by an indorser, in his answer, that he ever received notice of presentment, demand, non-payment and protest of the note sued on, is material; as without proof of such notice to the in-

dorser, the indorsee cannot recover against him. Hence, an answer containing such a denial cannot be struck out as false and sham. (*Ward* agt. *Waterhouse*, 2 Robt. 653.)

APPEAL.

1. An order made on an application to set aside a judicial sale, made under a judgment of foreclosure, on the ground of fraud, involves a question of strict legal right, and the decision thereon is not discretionary. The order can, therefore, be appealed to the court of appeals, under section 11, subdivision 3 of the Code, as a final order affecting a substantial right, made in a summary application in an action after judgment. (*King* agt. *Platt's Executors*, ante 26.)
2. The appeal from such an order can be taken within the two years prescribed by section 331 of the Code, as it is a final order, in the nature of a judgment. (*Id.*)
3. Where judgment has been entered in favor of the plaintiff on a report of a referee, and the defendant thereupon immediately appeals therefrom to the general term, and serves the necessary papers upon such appeal; and after service of the notice of the appeal, the defendant moves at special term, and procures an order referring the case back to the referee, to amend his report in a particular manner specified in the order, or otherwise, as he might think correct, and staying all proceedings in the action on the part of the plaintiff until the referee should amend his report, and giving the defendant thirty days after service of a copy of the amended report to make a case and exceptions, and staying all proceedings on the judgment until the decision of the general term on the appeal; and before the service of the order to amend upon the referee, he died:
2. Held, that the death of the referee was a misfortune the defendant must bear; and it followed that he must suffer all the consequences resulting from it. That the plaintiff was entitled to an order vacating the defendant's order to amend, &c., but the defendant was entitled to go on with his appeal from the judgment, and to have time to make a case and exceptions, with a stay. (*Juliand* agt. *Grant*, ante, 132.)
5. Upon appeal, where the trial is had before a jury, there is no power in this court, nor in the general term below, to review questions of fact. (*Parker* agt. *Jervis*, ante, 254.)

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6. If there is evidence competent upon the questions submitted to the jury, and sufficient to authorize their verdict, it is not open to re-examination in the court above. The finding of the jury is conclusive. (*Id.*)
7. Held, that the evidence in this case showed a fair case of a delivery of the goods, and a continued change of possession, under the assignment made for the benefit of creditors, which justified the verdict of the jury. (*Id.*)
8. An order denying a motion to set aside an execution issued for costs against plaintiffs personally, who claim to act as trustees, is *appealable*. (*Slocum agt. Barry, ante, 320.*)
9. Prior to the amendment of section 314 of the Code, in 1860, an appeal from an order of the county judge in *supplementary proceedings* would not lie in any cause originating in a justice's or county court. But under said amendment of that section, appeals now lie in such cases. (*Crounce agt. Whipple, ante, 333.*)
10. An application for leave to *amend a pleading* on the trial is always addressed to the discretion of the court, and, if denied, is not the subject of appeal or review. (*Dennis agt. Snell, ante, 467.*)
11. The following orders of the general term are not *appealable* to this court:
 1. An order affirming an order of the special term, denying a motion for a re-taxation of costs, and to correct the judgment roll.
 2. An order dismissing an appeal from an order of special term refusing a mandamus.
 3. An order dismissing an appeal from an order of special term denying a motion to correct the case. (*Hoe agt. Sanborn, 36 N. Y. R. 93.*)
12. But such orders may be reviewed upon an appeal from a judgment, in a case in which they were intermediate orders involving the merits and necessarily affecting the judgment. (*Id.*)
13. The act of 1855 (ch. 337) was passed for the advantage of the accused, in this, to wit: that a new trial might be awarded when substantial justice required it, even though the record disclosed no error. (*O'Brian agt. The People, 36 N. Y. R. 276.*)
14. But such act was not intended to authorize this court to disregard errors which, prior to its passage, were available to the accused, as grounds for a new trial. (*Id.*)
15. Where there has been a trial and verdict at the circuit, and there is a motion for a new trial made at general term before judgment, which motion is denied, and a judgment is entered upon the verdict, an appeal does not lie from such judgment to this court. (*Van Bergen agt. Bradley, 36 N. Y. R. 316.*)
16. The general disposition of the courts is to sustain the referee in his findings of fact. Where the judgment of a referee has been reversed by the general term upon the facts, the question upon the facts is open to review in this court. The question is, whether this court is so certain that the referee is in error upon the facts that they will assume to reverse his judgment. (*Westerlo agt. De Witt, 36 N. Y. R. 340.*)
17. This court can entertain no appeal from a judgment at special term. The judgment must have been appealed to the general term, and there have been determined, before this court takes jurisdiction, as the Code only authorizes a review upon appeal from the actual determination made at a general term. (*Potter agt. Van Vranken, 36 N. Y. R. 619.*)
18. The supreme court, on appeal, can review a judgment of a county court rendered on appeal from a justice's court, on exceptions that are made a part of the record, though the exceptions have been passed upon in the county court, on a motion made in that court for a new trial. (*Bliss agt. Schaub, 48 Barb. 564.*)
19. An order denying a motion for a commitment for not obeying a mandamus, is *appealable*. (*Peugnet agt. Phelps, 48 Barb. 566.*)
20. Where the alleged contempt is to be made out from contradictory affidavits, then the decision of the judge at chambers is conclusive; and if he is not satisfied as to the intent of the parties charged, the court, on appeal, would not reverse his decision. But where the contempt is not denied, or where an evasive excuse is offered, and the judge, notwithstanding, refuses to order a commitment, such an order may be appealed from, and relief may be had in the general term. (*Id.*)
21. After argument of a case upon appeal from a judgment rendered by a referee, leave will not be given to a party, on motion, to introduce as part of the case on the appeal exemplified or other copies of proceedings on which a warrant of attachment was issued, where the papers were in existence, and known to be so by the counsel for the applicant, at the time of the trial before the referee, and in the exercise of his

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discretion he refused to produce them. (*Onderdonk agt. Voorhis*, 2 Robt. 623.)

22. An order directing the defendant to deliver to the plaintiff an account in writing of the particulars of the payment or payments of the plaintiff's demand, and of the set-off alleged in the answer, or show cause why he should not deliver such account, &c., is not appealable. (*Watt agt. Watt*, 2 Robt. 685.)

23. An appeal by a plaintiff, from a judgment in his favor upon a verdict, is not waived by the tender of the defendant to him, and his acceptance, of the amount of such verdict and the costs included in such judgment. (*Benkard agt. Babcock*, 2 Robt. 175.)

24. The acceptance of a sum tendered on account of a claim only extinguishes it when it is all the claimant is entitled to, or is accepted as being so. The amount to which an appellant is entitled must depend upon the ultimate result of an appeal. (*Id.*)

APPEARANCE.

1. Where a defendant applies for, and obtains, an order from the court giving him time to answer, and serves that order, with a notice signed by an attorney, as "attorney for the defendant," this is doing an act in the progress of the cause, and submitting to the jurisdiction of the court; which is equivalent to an appearance. (*Ayres agt. The Western Railroad Corporation*, 48 Barb. 132.)

2. Where an attorney appears before a referee, for parties interested, and having filed exceptions to the report, as such attorney, is heard in behalf of such parties before the court at special term, upon the report, such appearance will be deemed a complete appearance, notwithstanding the attorney limits his appearance as being to object to the proceedings for irregularity because of want of notice to his clients. The limitation, under such circumstances, is void for incompatibility. (*Ballard agt. Burrowes*, 2 Robt. 206.)

ARREST.

1. In an action of *crim con.*, where the arrest of the defendant is based upon the nature of the action itself, and not upon extrinsic circumstances, and is supported by affidavits, it is not the rule of this court to vacate the order upon affidavits introduced by the defendant denying that there is a cause of action; as it would be trying the merits in advance

upon *ex parte* affidavits. (*Stuyvesant agt. Bowran*, ante, 51.)

2. There might be such a clear case made on a motion to discharge from arrest, as would justify a judge in vacating the order of arrest, although it would be virtually a disposal of the merits of the action; but it would be only in a case removed from all doubt, and upon a state of facts which would justify the judge to non-suit at the trial. (*Id.*)

3. Where a person is arrested upon a criminal warrant and brought before a police justice, and thereupon enters into a recognizance to appear at the court of general sessions to answer the charge, the police justice is thereby deprived of all further jurisdiction in the case. If he subsequently proceeds in the case and discharges the defendant for want of probable cause, or for any other cause, his proceedings are without authority, and a nullity. (*Sandrock agt. Knop*, ante, 191.)

4. An application, under section 199 of the Code, for the refunding of money deposited in lieu of bail, on the arrest of a defendant, cannot be made until bail has been put in and justified. (*Herman agt. Aaronson*, ante, 272.)

5. Where orders of arrest are sought to be vacated, on the ground that the return day has been changed, the irregularity should be pointed out in the moving papers. A statement in the defendant's affidavit, that, at the time of his arrest, the orders had no legal effect, for the reason that the return day had expired, is not a sufficient notice of the particular ground relied on. (*Lalor agt. Fisher*, 2 Robt. 669.)

6. Cotemporaneous acts are always competent as evidence to sustain a charge of fraud. (*Id.*)

7. Where a defendant, in an action pending in a court, was arrested in the street, near the place where such court was held, but before it had commenced its session, whether he had gone to attend either its trial or its removal to another court, upon the justification of proper sureties, while he was preparing to go home, because he thought nothing would be done: *Held*, that he was entitled to go to ascertain if anything would be done in the action, and to return un molested; and that merely stopping to announce to the counsel of the opposite party that no steps would be taken, was not such a deviation on his journey as authorized his arrest. (*Sahlinger agt. Adler*, 2 Robt. 704.)

8. A receipt by the defendant of money,

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as the attorney of the plaintiff, no part of which he has paid to her, gives the plaintiff a right, as of course, to an order of arrest, under subdivision 2 of section 179 of the Code; and upon obtaining judgment, she can issue execution against the person of the defendant, irrespective of any order of arrest having been granted. (*Gross agt. Graves, 2 Robt. 707.*)

ASSIGNMENT.

1. The doctrine is well settled, that the assignee of a chose in action, not negotiable, takes the thing assigned subject to all the rights which the debtor had acquired in respect thereto, prior to the assignment. (*Blydenburgh agt. Thayer, ante, 88.*)
2. Where A. loaned B. his promissory note for the exclusive benefit of B., the payee, who was at the time largely indebted to A.; and B., before the maturity of the note, transferred it to C., as collateral security for the sum of \$50 borrowed money (the note being \$950), C., after the maturity of the note, commenced an action against A., and obtained judgment upon the note. D. sold to B. property, for which he took in payment an assignment of this judgment from C., and paid C. his \$50 and interest; neither C. nor D. having any notice of the defense or set-off to the judgment by A.:
3. Held, that nothing having been done by A. which estopped him from setting up his equities as against either B., C. or D., the judgment was only available in the hands of either of them to the extent of the \$50 advanced by C., and the interest thereon, and the costs of the action. On the payment of these sums, A. was entitled to have the judgment cancelled. (*Id.*)
4. Where a *mortgagor* delivers manually his mortgage to a third person, to secure the payment of a debt of the mortgagor to such person, it does not necessarily follow that the intention of the parties was to transfer the bond. (*Merritt agt. Bartholick, ante, 129.*)
5. As a mortgage is but an incident to the debt which it is intended to secure, the logical conclusion is, that a transfer of the mortgage without the debt is a nullity, and no interest is assigned by it. (*Id.*)
6. The transfer of a mortgage does not of itself operate to transfer the bond; for the legal maxim is, the incident shall pass by the grant of the principal, but

not the principal by the grant of the incident. (*Id.*)

7. The right of action for money lost in betting is assignable. (*McDougall agt. Walling, 48 Barb. 364.*)

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

1. Held, that the evidence in this case showed a fair case of a delivery of the goods, and a continued change of possession, under the assignment made for the benefit of creditors, which justified the verdict of the jury. (*Parker agt. Jervis, ante, 254.*)
2. Preferential assignments for the benefit of creditors are not *per se* fraudulent and void. (*Jacobs agt. Remsen, 36 N. Y. R. 668.*)
3. An authority to the assignee, to employ and pay for all necessary attorneys, clerks and agents, and to take and have a reasonable compensation for his own services, etc., does not of itself render the assignment void, as it authorizes no more than is implied by law. (*Id.*)

ATTACHMENT.

1. In an action for wrongful conversion of personal property, a *warrant of attachment* may issue. (*Scott agt. Simmons, ante, 66.*)
2. Where an attachment is sought upon the ground that the defendant has assigned or disposed of, or is about to assign or dispose of his property, with intent to defraud his creditors (*Code, § 227.*), the facts should be such at least as to justify a deduction from them of such *fraudulent intent*. (*Id.*)
3. The Code contains no express limitation of the time within which a motion must be made to *set aside an attachment*. A motion to set aside the attachment for irregularity may be made after judgment obtained and execution issued in the action. (*Bowen agt. First National Bank of Medina, ante, 408.*)
4. The *receiver* of a banking association organized under the provisions of the act of congress, may move to set aside an attachment in the action, upon which the property of the bank had been seized. (*Id.*)
5. The *national banks* formed under the act of congress are *foreign corporations*, and liable to attachment, within the provisions of the Code. (*Id.*)
6. The Code only requires, in order for

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- the issuing of an *attachment* against non-resident debtors, that the action should be for the recovery of money, that the same should be on contract, that the plaintiff should specify the amount of the claim and the grounds of the demand. (*Lawton* agt. *Reil*, ante, 465.)
7. The cases which have been decided, as to the *form of the summons*, should not be considered as controlling in regard to the issuing of attachment. (*Id.*)
8. It is not necessary that the *affidavit* upon which a warrant of attachment is issued should show the *issuing of the summons*; it is enough if the summons was issued when the attachment is obtained. (*Id.*)
9. The attachment is not void for omitting to state "that it was issued in an action then pending." (*Id.*)
10. An *attachment* issued under the Revised Statutes entitled "of proceedings for contempts to enforce civil remedies," is a mere substitute for an *execution against the body*. It is equivalent to a *capias ad satisfaciendum*. (*People ex rel. Crouse* agt. *Cowles*, ante, 481.)
11. It is an execution in a *civil action*, upon which the defendant would be entitled to the *jail liberties*, under section 40 of article 3, chapter 8, part 2 of the Revised Statutes, page 433. (*Id.*)
12. Such an attachment is a mere *civil process* to enforce the payment of money; and is regular process for that purpose. But it seems that a *female* cannot be arrested or imprisoned on such process. (*Code*, § 179.) (*Id.*)
13. Under the Code, the property of corporations created by or under the laws of this state cannot be attached. (*Ferrier* agt. *American Glass Silvering Co.* ante, 496.)
14. An attachment may be issued against the property of a defendant who left the United States for a distant country, to take charge of three trading vessels in which he was interested, which actually performed several voyages from and to different distant foreign ports, and who was absent on that business for about two and a half years, as a non-resident of New York, within the statute relative to *attachments* against non-resident debtors, notwithstanding he had continued to keep up his house in the city of New York as before. (*Burrill* agt. *Jewett*, 2 *Robt.* 701.)
15. The nature of the business in which the absent party intends to be engaged may be looked at, to determine as to the uncertainty or probable duration of his absence. (*Id.*)
16. An action against a common carrier, to recover damages for the loss by negligence of goods intrusted to his care, is not an action arising on *contract*, within the meaning of section 227 of the Code of Procedure, authorizing the issuing of an *attachment* "in an action arising on contract for the recovery of money only." (*The Atlantic Mutual Insurance Co.* agt. *McLoon*, 48 *Barb.* 27.)
17. The affidavit upon which an application to a justice of the peace for an attachment is founded, must specify the sum in which the debtor is indebted, "over and above all discounts," as required by the statute. (*Kelly* agt. *Archer*, 48 *Barb.* 68.)
18. Where the application is made upon the ground that the defendant has departed from the county where he last resided, with intent to defraud his creditors, the affidavit must state that intent. It is not enough to state therein that the defendant left with the intent not to return, or secretly and without the knowledge of his family. (*Id.*)
19. The statute requires that a bond shall be executed and delivered to the justice before an attachment is issued; and until this is done, no attachment can properly issue. (*Id.*)
20. No other agreement will supply the place of the bond required by the statute; and if there is no bond, the justice will not acquire jurisdiction. (*Id.*)
21. If the condition be not such as the statute requires, the bond will be void. No other condition will answer; and that being a jurisdictional and substantial defect, it cannot be obviated. (*Id.*)
22. An undertaking by the plaintiff, not executed to the defendant, to the effect that if the defendant shall recover judgment, the plaintiff will pay all costs which may be awarded, and all damages which the defendant may sustain by reason of the attachment, is not a compliance with the statute. (*Id.*)
23. The allegation that the defendant has departed from the county with an intent to defraud his creditors, is an essential part of the case; and if it is not sustained by proof, the judgment will be void. (*Id.*)

ATTORNEY.

- There is no rule of law or of public policy precluding an attorney from entering into an agreement with one not

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- an attorney, to enter his office and act as his clerk, compensating him therefor by giving him an interest in the business. Such clerk can properly issue an execution upon a judgment in the name of the attorney. (*Brush agt. Lee, ante*, 283.)
2. When the statute in respect to fees commences to run. (*Adams agt. Fort Plain Bank*, 36 N. Y. R. 255.)
 3. It is the duty of the supreme court to cause charges to be preferred against an attorney, whenever it is satisfied from what has occurred in its presence, or from any satisfactory proof, that a case exists where the public good and the ends of justice require it to be done. (*In re John Percy*, 36 N. Y. R. 651.)
 4. An order to show cause, founded upon proper papers presented, served with the papers upon the attorney personally, is the proper mode of proceeding in such case. (*Id.*)
 5. The supreme court has power to remove an attorney for good cause shown, by ordering his name to be stricken from the roll of attorneys. (*Id.*)
 6. As a good moral character is one of the constitutional and statutory qualifications essential to the admission of an attorney, so he may be removed whenever he ceases to possess such qualification. (*Id.*)
 7. In an action against attorneys, to recover moneys collected by them as such, they cannot question the title of their client to the moneys they have collected for him by his authority; nor can they protect themselves from liability by any illegality in the transaction between their client and the person from whom they collected such money, or between their client and any assignor who may have been the original owner of the claim collected. (*Fogerty agt. Jordan*, 2 Robt. 319.)
 8. An admission in the answer, in such an action, of the employment by the plaintiff of the defendants "under the name of G. J. & B." as his attorneys, to prosecute a claim against H., is conclusive evidence, if not of a partnership between the defendants, at least of such a joint employment of them, and of their joint liability to the plaintiff, as would make an admission by one, in his answer, that "the defendants" received the moneys sought to be recovered, binding on the others. (*Id.*)
 9. An agreement, made since the Code, by an attorney, to commence and carry on a suit for a client, and to "furnish all lawyers, expenses, and everything else," is not a violation of the provision of the Revised Statutes (2 R. S. 288, § 71) which prohibits an attorney from buying a thing in action for the purpose of bringing a suit thereon. (*Id.*)
 10. In the absence of any special agreement to the contrary, the person who employs an attorney or counsellor, as such, is *paima facie* personally responsible to him for professional services rendered upon such employment. (*Bowman agt. Tallman*, 2 Robt. 385.)
 11. A trustee or guardian is personally responsible to an agent or attorney employed by him, professionally, in the execution of his duty, and not the estate or fund under his care. (*Id.*)
 12. The general agency of an undivided estate, and the entire control of its funds and concerns, together with an agency for its owners in relation thereto, of the defendant, after a prior employment by him of the plaintiff as an attorney and counsel to transact business for those of such owners as were infants, non-residents and irresponsible, are not sufficient to relieve the defendant from personal responsibility to the plaintiff for his compensation for professional services for the benefit of such estate, without notice that the defendant did not mean to make himself personally liable. (*Id.*)
 13. The mere refusal of a court to compel a purchaser to take title, under proceedings instituted under a statute authorizing the sale of the estates of infants, on the ground that the rights or interests of unborn children, who might be entitled under the instrument under which such infants derived title, were not cut off by such sale, is not sufficient of itself to deprive one who took such proceedings as attorney and counsel, on an employment to take such steps as he should deem advisable to relieve such estate from onerous assessments, of all compensation for such proceedings, notwithstanding he adopted subsequently other proceedings for this same purpose, whether such refusal was justifiable as matter of law or not; and
 14. There is no implied guaranty by a counsel, when employed by a client, of ultimate success. The only contract which is implied is that of ordinary skill, attention and diligence. (*Id.*)

AUTHORITY.

1. Of highway commissioners, how to be exercised. (*People ex rel. Dann agt. Williams*, 36 N. Y. R. 441.)

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AWARD.

1. Where, from the language employed in the commencement and conclusion of an award, it clearly appears that the award was made concerning the matters submitted, it will be presumed that the arbitrator did his duty, until it is proved that he neglected or refused to decide all the matters brought before him. (*Morewood agt. Jewett*, 2 Robt. 496.)
2. If the arbitrator does not state in his award that he has not taken a particular claim into account, and there is no proof on the subject, the award, if it does not expressly allow the claim, must be construed as a decision to reject it. (*Id.*)
3. Corrupt misconduct in an arbitrator is not a proper subject of inquiry, in an action upon the award. (*Id.*)
4. Each party to an arbitration is entitled to an opportunity to be heard, in the presence of the other, and to have reasonable time to produce his witnesses and examine them, unless there be something in the terms of the agreement of submission, or statements of the parties, expressing or clearly implying a different understanding. (*Id.*)
5. All presumptions and intensions are in favor of an award. In an action upon it, the defendant must point distinctly to the grounds impeaching it, in his answer; and he is confined to those there specified. (*Id.*)
6. If the defendants, in their answer, admit the award, but say it is void, they are bound to point out therein wherein it is void; otherwise evidence impeaching the award would be outside the issue. (*Id.*)

BAIL.

1. An application, under section 199 of the Code, for the refunding of money deposited in lieu of bail, on the arrest of a defendant, cannot be made until bail has been put in and *justified*. (*Herman agt. Aaronson, ante*, 272.)

BAILEE.

1. A person in the possession of and using property, as a bailee for hire, may recover damages for an injury thereto. (*Bliss agt. Schaub*, 48 Barb. 339.)

BANKING ASSOCIATIONS.

1. In an action by a banking association organized under the act of congress, the

defendant has a right to deny, in his answer, the legal existence of the plaintiff as a corporation; but an issue of that kind should not be tried by affidavits, on motion. (*The National Bank of the Metropolis agt. Orcutt*, 48 Barb. 256.)

BANKRUPTCY.

1. The lien of a levy made under an execution issued on final judgment obtained in a state court, before the filing of a petition of a creditor to declare a debtor an involuntary bankrupt, is preserved by the bankrupt act, and is to be respected by the United States District Court, sitting in bankruptcy, whether the said court takes to itself the administration of the property on which the lien is imposed, and applies it towards the satisfaction of the lien, or whether it allows the state officer who is executing the process of the state court to do so. (*Matter of Bernstein, ante*, 289.)
2. But it must appear that the judgment and execution of the state court are obtained *bona fide*, and without collusion with the debtor. (*Id.*)

BANKS.

1. The receiver of a banking association organized under the provisions of the act of congress, may move to set aside an attachment in the action, upon which the property of the bank had been seized. (*Bowen agt. First National Bank of Medina, ante*, 408.)
2. The national banks formed under the act of congress are *foreign corporations*, and liable to attachment, within the provisions of the Code. (*Id.*)
3. The customary certificate "good," by a bank at whose place of business a note is made payable, is information merely that the maker has funds to meet the note. (*Irving Bank agt. Weherald*, 36 N. Y. R. 335.)
4. This information may be furnished verbally, by letter or by a memorandum upon the note. The effect in each case is the same. (*Id.*)
5. The bank making the certificate has the means of accurate knowledge, and is bound to state the fact correctly. It is estopped from denying the truth of its statement, where the presenting bank relies upon its accuracy and fails to protest the note for non-payment. (*Id.*)
6. Where, however, a certificate of the goodness of a note is erroneously made, and the error is discovered and notice given to the presenting bank in time for it to make a re-presentation and

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- charge the indorsers, the certifying bank is discharged from further liability. (*Id.*)
7. And where, in such case, the certifying bank, to relieve itself from supposed liability on such a certificate, paid to the other bank the amount of the note; received it back with the mark "paid" stamped upon it, presented it for payment, and gave notice of non-payment to the indorsers on the day of its maturity: *Held*, that the bank took the note as purchaser and acquired the rights of a holder of the same, and could maintain their action against the indorsers of the note. (*Id.*)
8. A bank is discharged from all liability to a person for whom they have collected a sum of money, after they have paid it upon the checks of a third person, to whom their original employer had directed them, by letter, to "deliver" such sum. (*The Woodsport Bank agt. The Park Bank*, 2 Robt. 418.)
9. Such right is unaffected by the purposes for which the money was collected, or any orders for the disposition of the money after it had been paid away. (*Id.*)

BANK STOCK.

1. A shareholder of bank stock is not entitled to a reduction of valuation by the assessor on account of his debts. (*People agt. Dolan*, 36 N. Y. R. 59.)
2. Agent to sell bank stock not authorized to warrant by implication. (*Smith agt. Tracy*, 36 N. Y. R. 79.)
3. (See *Leitch agt. Wells*, 48 Barb. 637.)

BAWDY HOUSE.

1. Though indictable as a public nuisance, is not to be abated by a mob. (*Ely agt. The Board of Supervisors of Niagara County*, 36 N. Y. R. 299.)

BETTING.

1. The right of action for money lost in betting is assignable. (*McDougall agt. Walling*, 48 Barb. 364.)

BILLS OF EXCHANGE.

1. The essential facts to be stated in a notice of protest to bind the indorser, are these: (1.) The note has not been paid at maturity. (2.) It has been protested for non-payment. (3.) The identification of the note. (*Artisans' Bank agt. Backus*, 36 N. Y. R., 100.)

2. Where such information is shown to have been conveyed with reasonable certainty, it will be sufficient to charge the indorser. (*Id.*)
3. The receipt of an inadequate price for the sale of a bill of exchange, when there is no other evidence to impeach the sale and transfer, is not sufficient to justify the referee in finding that there had not been any sale and transfer of the same. (*Brown agt. Penfield*, 36 N. Y. R., 473.)
4. The defendants received from the plaintiffs, for collection, a draft drawn by a bank upon the Ohio Life and Trust Company, and on presenting the same to the company, at its office in New York, they received in payment the check of the trust company upon a bank, and surrendered the draft. The defendants neglected to present the check of the trust company on the day they received it, and before banking hours of the next business day the trust company suspended payment, and its check was dishonored, on presentation. *Held*, that the defendants having surrendered the draft, assumed the responsibility of taking the check of the drawee in payment. And that the existence of a custom, in the city of New York, among business men, to take the checks of the trust company without certification, in the same manner as bank checks, afforded no defense to an action by the plaintiffs to recover the amount of the draft. (*Nunnemacher agt. Lanier*, 48 Barb., 234.)
5. It inevitably follows from the act of congress commonly called the legal tender act, and from the decisions of the court of appeals of this state affirming the constitutionality of that act, that a bill of exchange payable "in specie or its equivalent," may be paid in legal tender notes, commonly called greenbacks. (*Jones agt. Smith*, 48 Barb., 552.)

BILL OF PARTICULARS.

1. The "account" alleged in a pleading, the refusal to deliver a copy of which, by the party alleging it, to the adverse party, precludes him from giving evidence of it under the Code of Procedure (§ 158), is some written instrument existing before the commencement of the action, evidence of the existence and contents of which is to be material to the party alleging it. In other words, an account claimed to have been rendered and acquiesced in; that is, an account stated. (*Johnson agt. Mallory*, 2 Robt. 681.)
2. It is not necessary, in an action for the

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completion of a piece of work by numerous successive acts of service, all of which contributed to such completion, to set out in the plaintiff's bill of particulars each service so contributing, and its character. (*Id.*)

3. Whenever the successive efforts of a party are directed to accomplishing a result to which they all contribute, and there is no customary mode of measuring the compensation for every act or series of acts tending to bring about the final result, it is not necessary to furnish a bill of particulars of the services, although it may be necessary to describe the nature and character of the services, and the result at which they were aimed. (*Id.*)
4. If a complaint is not sufficiently definite and certain in these respects, the remedy is by motion to make it so. (*Id.*)
5. Where the answer sets up a full and complete defense, by averring the absolute payment of the whole amount due the plaintiff, and satisfaction of his claim, the plaintiff cannot require a bill of particulars of the payments set up in the answer, under section 158 of the Code. (*Watt agt. Watt, 2 Robt. 685.*)
6. If the answer, in such a case, is defective in any particular in which it ought to be precise, the remedy is by motion. (*Id.*)
7. Even if the court has the power to order a bill of particulars, after the issues have been referred to a referee to hear and determine, it will not be exercised to interrupt the progress of the trial actually proceeding before such referee. (*Cadwell agt. Goodenough, 2 Robt. 706.*)
8. There can be no necessity for a formal written bill of items, where the plaintiff has been partly examined as a witness, although she has not already, upon her direct examination, disclosed the nature of her claim, since she can be compelled to do so on her cross-examination. (*Id.*)

BOARD OF HEALTH.

1. For any abuse by the *Board of Health* of the city of New York, of their authority, if they act *judicially*, as stated in the first subdivision, section 14, of the statute by which they were created (*Laws of 1866, chap. 74, § 14*), such as, 1st. Making an order originally for the abatement of an alleged nuisance without evidence, or for refusing to revoke it, on overwhelming or uncontradicted evidence of its being erroneous, a writ

of certiorari would afford a remedy. (*Reynolds agt. Schultz, ante, 147.*)

2. For refusing to fix a day for hearing of the party affected by the order a *mandamus* would lie. (*Id.*)
3. For the usurpation of jurisdiction in cases where not warranted by the statute, a *writ of prohibition* would furnish a corrective. (*Id.*)
4. The authority and duties of the Board of Health, under said first subdivision of the said fourteenth section, differ so widely from those created under the second of such subdivisions, as to justify the *constitutionality* of the former, even if the latter were defective. (*Id.*)
5. This board are, by the statute, vested with the preliminary right of determining their *jurisdiction*, for the purpose of a hearing and final adjudication; and their decision upon such jurisdiction is final, if there is *any evidence* before them tending to sustain it. (*Id.*)
6. Their provisional order, granted under the statute, may become final by the failure of the parties interested and notified to demand a hearing. And whatever objection may be made in cases where no service of notice of the order is made, it will not apply in a case where the party is notified. (*Id.*)
7. Abundant means are provided by the statute for obtaining the *sufficient proof* which the board are to take without leaving their office, or uttering a word themselves of accusation. Therefore, such a notice of accusation, or obtaining evidence in advance, with such opportunity of being heard with evidence, and such a notice of final determination, as the statute prescribes and furnishes, is an exercise of *judicial power*, and binding, unless prevented by some positive constitutional prohibition. (*Id.*)
8. The following objections to the constitutionality of the exercise of power by the Board of Health, under the said first subdivision of section 14 of the statute, that such proceedings violate "the law of the land," required to be observed by section 1, article 1, of the constitution of this state, and are not "due process of law," under the 6th section of the same article, cannot be maintained, to wit: 1. That the functions of *accuser* and *judge* are blended in the same body; 2. That no *process is served*, or *notice of the proceedings* given to the parties interested; 3. That the *judgment precedes the trial*; 4. That the accused is *not confronted with witnesses against him*; 5. That the *testimony is not under oath, nor the ordinary rules of evi-*

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dence observed; and, 6. That no means are afforded to the accused to compel the attendance of witnesses. (*Id.*)

BONA FIDE HOLDER.

1. The term *bona fide holder* or *purchaser* has reference to the standing of the holder or purchaser in respect to the *original owner*; that is, that he shall be free from any privity with the fraud, by having no part in it, or notice of it, either actual or constructive. (*Williams agt. Tilt*, 36 N. Y. R. 319.)
2. The existence of usury in the contract between the fraudulent purchaser and his vender, who, without notice of the fraud, makes advances on the property, does not affect the relative rights existing between him and the original owner. (*Id.*)
3. The cases of *Ramsdell agt. Morgan* (16 Wend. 574) and *Kratzen agt. Parks* (2 Sandf. S. C. 60), commented on and questioned by PARKER, J. (*Id.*)
4. An usurious agreement cannot be assailed by one not a party to it, or not claiming under the party injuriously affected by it. (*Id.*)

BONDS.

1. This court adheres to the law as laid down by it in the case of *Starin agt. The Town of Genoa* (23 N. Y. R. 438) and in this case (24 N. Y. R. 114), that that the relator (plaintiff) cannot maintain an action upon these bonds against the town of Genoa, issuing them, even if a *bona fide holder*; although a contrary ruling has been made by the supreme court of the United States, which has held that these bonds, in the hands of a *bona fide holder*, are legal and valid obligations of the town issuing them, and can be enforced. (*Fiedler agt. Mead, ante*, 294.)
2. These bonds and the coupons are the foundation of the relator's claim, and they being invalid, for reason that it appeared that the assent of two-thirds of the resident persons taxed in the town of Genoa, as appearing on the assessment roll, had never been obtained, as required by the act, the relator's right fails; and he, having no right to any money, has no right to a mandamus to compel anybody to do any act to enable him to maintain it. (*Id.*)
3. No action at law can be brought upon a bond given to the people of the state, as a bond, except when authorized by

the obligees; in other words, by statute or equivalent authority. (*Annett agt. Kerr*, 2 Robt. 556.)

4. No special equity is presented by a case where the only facts appearing by the complaint, in an action upon an administrator's bond, are a revocation of the letters of administration; a decree against the administrator, on an alleged final accounting, the return of an execution on such decree unsatisfied, an assignment of such bond to the parties in whose favor the decree was made, and an assignment of it by them to the plaintiff. (*Id.*)
5. The action upon such a bond should be brought in the name of the people. The assignee cannot bring an action thereon thereon in his own name, as the real party in interest, under the Code. (*Id.*)
6. Even if such a bond can be prosecuted by the assignee thereof in his own name, the complaint should be dismissed if there is no sufficient evidence adduced on the trial of the amount for which the administrator was responsible. Evidence of payment by him to the next of kin, and losses of money by theft, should be admitted in exoneration of his liability. He is also entitled to be credited with his wife's share of the estate. (*Id.*)
7. The sureties in an administrator's bond can only be made liable for the disobedience of the administrator to lawful orders of the surrogate. (*Id.*)

BROKERS.

1. It is not compatible with the duties of a mutual agent, for him to sell merchandise on behalf of one of his principals, before he owns it, to the other, and then to buy it from a third person, to enable him to complete the contract on behalf of the vender. (*Stoker agt. Partridge*, 2 Robt. 193.)
2. Where S., before the plaintiff owned any petroleum oil, and by virtue of a general employment as his agent, sold 250 barrels, on his behalf, to the defendant, of whom he was a broker for the purpose, and, without any new instructions from the plaintiff, bought that quantity from a third person, on his own account, for the purpose of fulfilling the contract: *Held*, that he occupied the position, in the transaction, of a broker or mutual disinterested agent of the parties in the action. (*Id.*)
3. A principal who has been brought by a broker into communication with the party with whom he is dealing, cannot

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deprive such broker of his commissions, by taking the negotiation into his own hands and completing the sale; much less deprive him of the benefit of the initiatory steps taken by him, by revoking his authority to complete the contract. (*Stillman agt. Mitchell*, 2 Robt. 523.)

4. It is sufficient for a broker, in order to entitle himself to commissions on a sale, to bring his principal in contact with a satisfactory purchaser, with whom he completes the bargain to bring which about the broker was employed as an agent. (*Id.*)

5. In an action to recover brokerage on the sale of steamships to the United States government: *Held*, that the judge properly charged that the main question for the jury to determine was, whether the plaintiff's action in the matter directed or drew the attention of the navy department, or its agent, to the steamers, as vessels for sale, and led to negotiations that resulted in the purchase; and that he was not bound to charge that the plaintiff's agency was the procuring cause of the sale. (*Id.*)

6. The only conditions precedent to a right to recover, in such an action, are, the original discovery of the purchaser, the starting of the negotiations by the broker, and a final closing of the bargain by or on behalf of the principal. (*Id.*)

7. The fact that a person employing a broker to sell vessels, and binding himself personally by a contract under seal to pay a specified commission whenever a sale shall be effected as a consequence of his exertions, is not himself the owner of the vessels, will not deprive the broker of his commissions, or defeat an action brought by him therefore against his employer. (*Id.*)

8. The plaintiff's employed the defendants, who were stock brokers, to sell gold for them to the amount of \$30,000. They had not the gold to deliver, but it was intended to sell it short, in expectation of a fall. The defendants made the sale, and notified the plaintiffs. A deposit was made with them, in the check of the plaintiffs' firm, for \$15,700, which the plaintiffs alleged was to be placed to their credit. Subsequently, the defendants gave notice to the plaintiffs that they would require some money for the next day; and \$4,000 was paid them. The defendants afterwards gave notice that, unless they had a further margin, they should close out the gold in an hour. They then bought the gold for the plaintiff, at a large loss.

The plaintiffs denied their right to do so, and repudiated the transaction, and brought an action to recover back the moneys deposited. *Held*, that the defendants were not bound to continue liable for the plaintiffs' contracts for an indefinite period. That, if the margin was deficient, they might have closed the transaction without notice, by purchasing the gold on the plaintiffs' account; but if they were unwilling to continue liable even with the margin, they could give notice to that effect, and then if, after a reasonable notice, the plaintiffs did not comply, they could act in the same way. (*Sterling agt. Jaudon*, 48 Barb. 459.)

9. In such a transaction, no notice is necessary of the time and place at which the brokers will make the purchase. That rule only applies to a pledge of stocks or other securities for the payment of a debt. (*Id.*)

10. On the 5th of October, 1864, the plaintiff gave to the defendants, who were stock brokers, a written order to sell for his account one hundred Michigan Southern, at sixty-one three-eighths. The plaintiff had no stock in the hands of the defendants, nor did he ever supply them with any to enable them to execute the proposed sale. Both parties contemplated a speculative transaction, called a "short sale." The defendants did not make such a sale, but sold the stock, and the next day delivered the stock sold, which they had borrowed from another customer. On the 15th of November, 1864, the defendants bought one hundred shares Michigan Southern for the account of the plaintiff, at seventy-three, without any specific orders to do so. *Held*, that the plaintiff was not liable for the difference in the price of the stock as shown by the sale on the 5th of October and the purchase on the 15th of November. (*Knowlton agt. Fitch*, 48 Barb. 593.)

BOTTOMRY.

1. It is essential to the contract of bottomry that re-payment of money loaned must be dependent upon the safety of the vessel upon which the loan was made. (*Northwestern Ins. Co. agt. Ferdinand*; 36 N. Y. R. 139.)
2. Where the insurer is authorized to loan upon bottomry, and for the purpose of making such loan, he, with the consent of the parties, suspends an amount already insured equal to the amount of the bottomry loan, to enable him to make such loan without increas-

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ing his risk upon the vessel, such bottomry loan is valid. (*Id.*)

BOUNDARY.

1. Of street or public highway; bounded by the center of the same. (*Perin agt. N. Y. Cen. R. R. Co. 36 N. Y. R. 120.*)

CAPITAL POLICE DISTRICT.

1. The law of 1865, establishing a capital police district, embracing portions of the counties of Albany and Rensselaer, is in conflict with no provision of the state constitution. (*People agt. Shepard, 36 N. Y. R. 285.*)
2. The amendatory act of 1866, extending that district so as to include within its bounds a portion of the county of Schenectady, is also free from constitutional objection. (*Id.*)
3. In a public statute, applicable to particular localities, or to known and open highways, there is ordinarily no occasion for the minuteness and precision of description usual in conveyances of real estate. (*Id.*)
3. The validity of general laws, enacted by the constituted authorities of the state, cannot be challenged in the courts on the theory that they may have been adopted from motives in hostility to the public good. (*Id.*)

CARRIERS.

1. By the contract between the owners of goods and common carriers, risks by fire, in the transportation of goods, were expressly excepted. *Held*, that, by the terms of the contract, only ordinary risks were intended, and that the carriers were not excused from liability, in case of loss, if the loss was caused by the fault or negligence of the carriers, or their agents or employees. (*Stedman agt. The Western Transportation Co. 48 Barb. 97.*)
2. *Held*, also, that the carriers were exempted from liability for a loss of the goods occurring by fire while in a railroad depot, at an intermediate point on the line of transportation, unless their negligence, as common carriers, in transporting the goods, contributed to produce the loss. (*Id.*)
3. Where no particular time is named within which goods are to be forwarded, or that they shall be forwarded at once, without any delay, carriers are entitled to such time as will be reason-

able, in the ordinary course of the business in which they are engaged. (*Id.*)

4. Goods received by the defendants, as common carriers, from the plaintiffs, at Boston, to be transported to the west, arrived at the railroad depot, at East Albany, on the 27th and 28th of June, 1861, and were stored in the warehouse of the railroad company, where they remained until the 5th day of July, when the warehouse and its contents were destroyed by fire. The defendants had no direct notice of the arrival of the goods, but they were left to be called for, in the usual course of business, which was for the defendants to send a boat for them once a week, or once every two weeks, or as often as there were enough to send a boat for. *Held*, that the delay in the transportation of the goods was not unreasonable, but in accordance with the usual course of business, and not beyond the ordinary time allowed for that purpose. And that there was no rule requiring the defendants to act *immediately*, and transport what goods were on hand, without regard to the quantity or the expense caused by thus deviating from their usual custom and practice. (*Id.*)
5. Where, in an action against carriers, the plaintiff intends to claim that there is a disputed question of fact in regard to the defendant's negligence, he should make a distinct request that it be submitted to the jury. (*Id.*)
6. It is well settled that when a loss to cargo, from leakage or otherwise, occurs in the port where it is laden, and before the voyage begins, the carrier is liable for its value at such port. But when the loss happens after the vessel has left the port of shipment, then the value of the goods at the place of destination, deducting the charges, furnishes the true rule of damages. (*Krohn agt. Oechs, 48 Barb. 127.*)
7. In an action by the plaintiffs, as owners of ninety-one kegs of tobacco, to recover the damages sustained by the tobacco while in the defendants' possession as a common carrier, it appeared that the tobacco had been sold by the plaintiffs to arrive—sixty-seven kegs to S. & Co., and twenty-four kegs to C. & Co. The whole was consigned to S. & Co., but they refused to take the tobacco in fulfillment of the sale to them, on account of its damaged condition and so notified the plaintiffs. C. & Co. took the twenty-four kegs at the contract price, sixty-two and a half cents per pound, but it did not appear that it was taken on account of that contract. *Held*, that these facts did not warrant

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the objection that the tobacco was delivered by the plaintiffs to the purchasers, and that no right of action for the recovery of damages remained in the plaintiffs. That the tobacco having been damaged before it reached the purchasers, the delivery could not be claimed as a performance of a contract for the delivery of sound tobacco. (*Withers agt. The New Jersey Steamboat Co.* 48 Barb. 455.)

8. Held, also, that there was no ground for objecting that S. & Co. could not act as agents or consignees of the tobacco for the account of the plaintiffs; they having notified the plaintiffs that they did not receive it as purchasers. (*Id.*)

9. The duty of a carrier of goods is discharged by delivering them either to the person to whom they are directed or to some one authorized by him to receive them. (*Platt agt. Wells*, 2 Robt. 101.)

10. The consignee, if not presumptively the owner of the goods, so far as the consignors are concerned, is at least to be treated as their agent. (*Id.*)

11. Consignors who, after being notified that the goods have been obtained from the carriers of them by a third person, by authority of the consignee, not only makes no objection to such delivery, but in an action against such third person upon a note given to them for the price of such goods, make oath that it was received for goods sold and delivered, will be deemed to have ratified the delivery to such third party. (*Id.*)

CERTIORARI.

1. Where a common law certiorari is directed to the board of commissioners of highways to bring up the proceedings and determination of such officers for review, the supreme court can only affirm or reverse their proceedings or decision. (*People agt. Ferris*, 36 N. Y. R. 218.)

2. If the court goes further, and sets aside the order appointing the referees, and orders the appointment of a new board, it acts without jurisdiction, and such part of the order will be void. (*Id.*)

3. But such void part of the order may be set aside on motion to the supreme court, or on appeal to this court. (*Id.*)

4. But on appeal such part of the order will be reversed without costs to either party. (*Id.*)

CHAMBER ORDERS.

1. Where the parties stipulated that a motion noticed for a special term might be heard before the judge at chambers, with the same effect as though heard at special term, and that, upon filing his decision, an order might be entered in pursuance thereof, "as of the special term":
2. Held, that an order purporting to have been made by the judge "at chambers, as of special term," could not be supported as an order of the court, and an appeal from an order thus entered was dismissed. (*Kelly agt. Thayer*, ante, 163.)
3. Quere—Whether the decision of a judge at chambers, under such a stipulation, amounts to an award? (*Id.*)
4. To give effect to the intention of the parties in such a case, the prevailing party should enter the order as an order of the special term, without reciting the stipulation, or noticing the fact that it was heard at chambers, instead of being heard at special term. (*Id.*)
5. It seems the court at special term would refuse to set aside an order thus entered, upon the ground that the party was estopped by his stipulation. (*Id.*)
6. Where an order has been entered up by inadvertence, which plainly frustrated the object the parties had in view in entering into the stipulation, it seems the court at special term may set aside both the order and stipulation. (*Id.*)

CHARGE OF THE JUDGE.

1. It is sufficient that the charge of a judge is in substantial accordance with the request, though he declines to adopt the particular language proposed. (*Fay agt. O'Neill*, 36 N. Y. R. 11.)

CHATTEL MORTGAGE.

1. When demand is made by the mortgagor of the amount secured to be paid by a chattel mortgage payable on demand, and is refused, the legal title to the mortgaged property becomes absolute in the mortgagor. (*Hulsen agt. Walter*, ante, 385.)
2. After such demand and refusal, the mortgagor cannot charge the property by a second mortgage. Under such circumstances, a subsequent mortgagee would take no interest in the property, and would have no right to redeem by offering to pay the first mortgage. (*Id.*)

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3. A mortgagee of chattels, whose title has become absolute, is not bound to foreclose his mortgage. To extinguish the equity of redemption, he should do so. (*Id.*)

4. A refiling of a chattel mortgage by the mortgagee, after his legal title to the property has become absolute, is no waiver of the forfeiture as against a subsequent mortgagee, who had taken his mortgage previous to such refiling, with the knowledge of the forfeiture. (*Id.*)

CHATTELS.

1. Where chattels are sold conditionally and delivered to the vendee, the vendor's rights in the property remain as against the vendee and his voluntary assignees, but not as against a bona fide purchaser without notice. (*Wait agt. Green*, 36 N. Y. R. 556.)

CHECKS.

1. In an action by the holder against the drawer of checks, the payment whereof had been stopped, the defense set up by the answer was, that the checks were obtained from the defendants by S., and others, without consideration, and with a preconceived design to cheat the defendants out of the amount thereof; that they were intended to be advances of money, under an agreement entered into between S. and others on the one hand and the defendants on the other, upon false representations and promises on the part of the former; that they were passed by S. to W. and by W. to the plaintiff, without parting with any consideration; that both W. and the plaintiff knew the purpose for which the checks were given; that they were diverted therefrom, and that the plaintiff was not the lawful owner and holder thereof. The evidence showed that the checks were lent by the defendants to S., to enable him to buy cattle, upon an understanding that he would repay such loan and a small previous debt, with the hides and tallow resulting from such purchase. Held, that, even if the purpose thus proved, for which the checks were lent, had been alleged in the answer, it would still be a serious question how far it was one for such a diversion of the checks as the defendants could complain of. (*Purchase agt. Mattison*, 2 Robt. 71.)

2. The rule is that a lender of accommodation paper has no right to complain of such an appropriation of it as would divert it from any purpose in the ac-

complishment of which he has no legal interest. (*Id.*)

3. Held, that the defendants in this case had no legal interest in the purchase of the cattle, which was the purpose of the loan; the utmost benefit they could expect from the application of the checks to the purchase of cattle being the subsequent payment by their hides and tallow, if S. should choose to pay in that manner. (*Id.*)

4. The liability of second indorsers of a check is complete if the check be taken by the holder as a purchaser in good faith, or was indorsed voluntarily for the accommodation of any one; notwithstanding a prior indorsement of the payees was a forgery. (*Turnbull agt. Bouyer*, 2 Robt. 406.)

5. The forgery of the names of the payees of a check, on the faith of whose genuineness the holder will be presumed to have taken the check, dispenses with notice of its non-payment. (*Id.*)

6. Where parties who receive a check voluntarily indorse it, and then allow the person from whom they received it to take it back and carry it away, with their names remaining upon the back of it uncancelled, thereby enabling him, on the faith of such indorsement and their responsibility, to obtain money upon it, they will be liable to the holder, notwithstanding a previous indorsement of the names of the payees was forged. (*Id.*)

7. By putting their names on the back of a check, the indorsers give it currency. Even if the holder should have reason to believe that a prior indorsement was not genuine, they undertake by their indorsement, if it is not, to pay what the holder has given for the check. (*Id.*)

CHURCH MEMBERS.

1. Church members are not the only *cestuis que trust*, as distinguished from other members of a religious society. (*Gram agt. Prussia, etc., Society*, 36 N. Y. R. 161.)

CITY OF BROOKLYN.

1. Even assuming that it would be competent and lawful for the city of Brooklyn to take lands for a public street or highway, on the payment of a nominal sum therefor, upon the ground that the original proprietors had dedicated the same to that purpose, it does not follow that they can be appropriated, and that

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- the title thereto can become vested in the city as "public shares," under the act of April 17, 1866, "for the improvement of the Brooklyn Heights." (*Matter of Brooklyn Heights*, 43 Barb. 288.)
2. When such proprietors declared their willingness to dedicate their property to the purposes of a street, whenever the public authorities would accept the dedication, the property, nevertheless, continued subject to their control and absolute enjoyment until such acceptance was made. (*Id.*)
 3. In determining the value of land thus taken, it is proper for the commissioners of estimate to take the fact of such dedication, and the probability of its future acceptance, into consideration; and if the property is thereby depreciated, the amount of the depreciation may be properly deducted from what would otherwise have been the fair, full value thereof. But it is erroneous to allow a nominal compensation only to the owners. (*Id.*)
 4. The boundary line between the county of New York and the county of Kings is the low water mark of Long Island, the county of New York including all the waters of the East river to such line of low water. The waters inside the lines of the piers and bulkheads of the Atlantic basin, on Long Island, below low water mark, are within the boundaries of the county of New York. (*Orr agt. City of Brooklyn*, 36 N. Y. R. 661.)
 5. So held, where the owner of a floating elevator, lying inside of such piers and below low water mark, which was destroyed by a mob in July, 1863, brought an action against the city of Brooklyn to recover such damages. It was held, that such elevator was not within the limits of Kings county, and that the action could not be maintained. (*Id.*)
 6. The case of *Luke agt. The City of Brooklyn* affirmed, and its principle declared to be in accordance with the decision of the present case. (*Id.*)
- CITY OF NEW YORK.**
1. The amended charter of 1857, of the city of New York, provides that, to make the proceedings of the common council legal and binding, they must be advertised for a certain specified time in the corporation newspapers. (*Wood agt. The Mayor, &c., ante*, 501.)
 2. Where a newspaper was designated as one of such papers, with instructions that it should publish the proceedings of the different boards, and services
- thereunder were performed before the law of May 4, 1866, called the tax levy law, was passed, and the plaintiff's rights had accrued and were vested:
3. Held, that the 10th section of the act of May 4, 1866, could not act retrospectively so as to affect the plaintiff's right to recover for such services. (*Id.*)
 4. Section 10 of the act of May 4, 1866, providing that the mayor, &c., of the city of New York, shall not be liable upon any contract or expenditure, &c., made by any board or officer of the corporation, not expressly authorized by that act, is *unconstitutional and void*, as embracing a subject not contained in the title of the act, and is no answer to an action for services of an attorney performed for the corporation. (*Smith agt. The Mayor, &c. ante*, 508.)
 5. A proceeding to determine compensation for damage for taking lands to be laid out for squares, avenues and streets, in the city, is a "special proceeding," under the Code. (*King agt. Mayor, &c., of New York*, 36 N. Y. R. 182.)
 6. A writ of error does not lie to this court to review an order of the general term, dismissing an appeal thereto from an order of the special term, made in such proceeding. (*Id.*)
 7. In such proceeding, the confirmation of the report of the commissioners of estimates and assessments, by the supreme court, is final and conclusive upon all persons, and cannot be reviewed. (*Id.*)
 8. The act of the legislature of 1866 (*Laws of 1866*, vol. 2, p. 2070, § 10), which provides that no judgments in actions upon contracts shall be entered by default or otherwise, in any court, against the corporation of New York, "except upon proofs in open court that the amount sought to be recovered in said judgment still remains unexpended in the city treasury to the credit of the appropriation to the specific object or purpose upon which the claim sued for is founded," applies to actions commenced prior to its passage, as well as to those thereafter to be commenced. (*The Tribune Association agt. The Mayor, &c., of New York*, 48 Barb. 240.)
 9. The act of 1866 does not affect the contract. It does not apply to the debt, but to the remedy. It delays the plaintiff's recovery until an appropriation to cover the claim is made. (*Id.*)
 10. Where, in an action against the corporation of New York, for work and labor, the defendants in their answer admit the performance of the work and

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labor, and that a sum specified is due, the plaintiff will not be allowed to take judgment for the amount admitted to be due, unless evidence is furnished that a sufficient amount of the appropriation to the specific object, to pay the claim remains unexpended, at the time of the application. (*Id.*)

CLAIM AND DELIVERY.

1. In an action for the recovery of possession of personal property, where the defendant restores the possession to the plaintiff before the actual commencement of the action, and the plaintiff objects to the manner in which the property is returned by the defendant, as being injurious to him, but nevertheless accepts the possession, the action cannot be maintained. (*Carrie agt. Corbet, ante 19.*)
2. It is error in such a case to let the cause go to the jury; the court should grant a non-suit, or direct the jury to find a verdict for the defendant. (*Id.*)
3. An action for claim and delivery of personal property may be brought against the wrongdoer, although he has parted with the possession of the property before the commencement of the action. (*Ellis agt. Lersner, 48 Barb. 539.*)
4. Where the defendant was charged with fraudulently obtaining the plaintiff's property, and with having placed it on board of a vessel, and consigned to his uncle, in London, and it was alleged that the defendant had drawn drafts upon the bill of lading, payable when the property should arrive; Held that the case came within the above rule; and that the plaintiffs had a right to ask a jury to pass upon these questions, and if they found the transaction to be fraudulent, to recover the value of the goods if possession could not be delivered. (*Id.*)

COLLATERAL SECURITY.

1. Where collateral security for the payment of a note is given to the payee or holder thereof by the maker, and authority is given to sell such collaterals if the note is not paid at maturity, and, on failure to pay the note, the collaterals are sold, the purchaser thereof does not stand in the relation of pledges, nor is there any privity between the pledgor and such purchaser. (*Lewis agt. Mott, 36 N. Y. R. 395.*)
2. The purchaser of such collaterals does

not assume the duties or responsibilities of a trustee in respect to the same, but he acquires the title of the pledgor. (*Id.*)

3. Where property pledged as collateral security for the payment of a note has been sold or transferred to a third party, who has a lien thereon for the payment of such note, the holder of such collaterals cannot be required to deliver them up until there has been a tender of the amount due. (*Id.*)

COMMISSIONERS OF LOANS.

1. The provisions of the law of 1837, in reference to loaning certain moneys of the United States, &c., in reference to entering the order for the advertisement of sale, also entering a copy of the advertisement, and entering the places where, or the persons by whom the advertisements were put up, in the minute-book of the commissioners, are directory rather than compulsory, as against a bona fide purchaser ignorant of such irregularity; notwithstanding the 33d section of such statute says: "All purchases made contrary to the provision of this section, shall be void." Such irregularities are not a violation of the 33d section. (*White agt. Lester, ante 136.*)
2. There is no such disability in the cashier of a bank purchasing real estate at a public sale in his own name, but in fact for the benefit of the bank, as there is in the case of trustees with regard to the lands of their beneficiaries. Such a transaction in the former case would not avoid the sale, while in the latter it would. (*Id.*)
3. Where both of the commissioners, under the statute of 1837, are present at and make the sale of the mortgaged premises, and the entry thereof in their book of minutes is made by only one of them, it is not a fatal irregularity. Besides, there is nothing in the law which requires this entry to be signed by the commissioners. (*Id.*)
4. Where the plaintiff succeeds to the title of the mortgagor of the premises, and suffers the mortgage to become foreclosed by operation of law, by his delinquency in paying the amount due by the terms of the mortgage, it is equivalent to a foreclosure pronounced by a decree of a court, and nothing remains in the plaintiff but the special privilege of redemption. He has no right which can be prosecuted by action of ejectment against the purchaser in possession under the sale. (*Id.*)

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COMMISSIONERS OF RECORDS.

1. The act of 1855 appointing *commissioners of records* for the city and county of New York, provided, that "the necessary expenses incurred by them shall be paid by the county treasurer, upon the certificate of said commissioners; and the supervisors of said city and county, are hereby authorized to raise, by tax, the amount required to defray the same." (*People agt. Supervisors of New York, ante* 379.)
2. The act of 1860, containing the annual tax bill, provided, that "the said board of supervisors are hereby empowered to cause to be raised and collected in manner aforesaid, the further sum, not exceeding \$80,000, to meet and pay whatever sum up to that amount, as may be found due to the contractors with the commissioners of records of the city and county of New York. The comptroller is authorized to pay said amount when the same shall be judicially determined." (*Id.*)
3. *Held*, that the board of supervisors, under these acts, was neither charged with the duty, nor clothed with the power of making payment of the moneys thus authorized to be raised. The latter act left it with the courts to determine whether the claimants were entitled to this money; and the comptroller was not authorized to pay it over until the right of the contractors should be judicially ascertained. (*Id.*)
4. This judicial determination which was to precede the application of the fund by the comptroller, was not a condition precedent to the authority of the board to raise it. The board of supervisors were, therefore, required imperatively to raise this fund, irrespective of the judicial determination, and on their refusal a *mandamus* would lie to compel them to do so. (*Id.*)

COMMON CARRIER.

1. Where in an action against a common carrier for damages by reason of negligence and fault in carrying the plaintiff for hire, where there is sufficient evidence to make it the duty of the jury to determine whether the plaintiff's sickness and loss of time were occasioned by the fault of the defendant, his agents or servants, the jury are authorized to allow him compensation therefor, although the plaintiff has given no evidence upon that point. (*Ward agt. Vanderbilt, ante*, 144.)
2. An *express company* is to be regarded as a *common carrier*, and their responsibility for the safe delivery of property intrusted to them is the same as other common carriers. But they may limit their liability by express contract. (*Bellag agt. Dinsmore, ante*, 421.)
3. A common carrier receives a consideration for the carriage of property, and he is bound to carry it accordingly; he cannot by a mere notice, relieve himself from that liability. Even proof of such notice being brought to the knowledge of the owner, would not be sufficient to relieve the carrier of liability; but an *express contract must be proven*. (*Id.*)
4. The mere acceptance of a receipt of the carrier by the owner or shipper, limiting the liability of the carrier, is not proof of an *express contract* between the parties settling and limiting such liability. (*Id.*)
5. Passenger carriers bind themselves to carry safely those whom they take into their coaches, to the utmost care and diligence of very cautious persons. (*Maverick agt. Eighth Avenue R. R. Co. 36 N. Y. R.* 378.)
6. This principle applied to the conductor of a car on the Eighth Avenue railroad, in the city of New York. He is bound to know where, under the circumstances, it is prudent to stop the car, and to bring a passenger upon the platform to get off the same. (*Id.*)
7. In an action against a common carrier for goods delivered to him to be transported, etc., the right of the true owner may be set up by the carrier as a defense against the shipper or bailor, in all cases where the property has been delivered to such owner, either voluntarily or on demand, or where it has been taken by legal process, in a suit instituted for such purpose. (*Blizen agt. H. R. R. Co. 36 N. Y. R.* 403.)
8. The common carrier is exonerated from his obligation to his bailor, where the property of the latter is taken from him by legal process, and where the carrier immediately notifies him of such taking. (*Id.*)
9. A common carrier being bound to make safe delivery of goods at the place of destination, such obligation, together with his claim for advances and freight, give him an insurable interest to the extent of the fair value of the property insured. (*Savage agt. Corn Exchange Ins. Co. 36 N. Y. R.* 655.)
10. The measure of damage is the true value of the grain at the time and place where the loss occurred. (*Id.*)

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COMMON SCHOOLS.

1. Where moneys are raised in cities and districts for school purposes, the schools of the several incorporated *Orphan Asylum Societies* within the state, other than those in the city of New York, are entitled under the act of 1850, to distribution thereof in the same manner and to the same extent, in proportion to the number of children educated therein, as the common schools in their respective cities and districts. (*St Patrick's Orphan Asylum agt. Board of Education, Rochester*, ante 227.)
2. But moneys devoted by the constitution of the state for the support of common schools, cannot be lawfully appropriated to the support of such asylums, or for the support of common schools therein, as the latter is not a common school within the constitutional meaning of the term "common schools." (*People agt. Board of Education, Brooklyn*, 13 Barb. 400; *People ex rel. Brooklyn Orphan Asylum agt. Board of Education, Brooklyn*, Ms. Court of Appeals.) (*Id.*)
3. An action under section 432 of the Code, in the nature of a *quo warranto*, by the people on the relation of a person claiming title to the office of *Trustee of a school district*, will not lie, where that question has been presented to the superintendent of public instruction and decided by him adverse to the relator. The act of 1864, relating to public instruction, makes the decision of the superintendent on that question final. (*Hill agt. Collins*, ante 336.)

COMPLAINT.

1. Where a *summons* is issued under the first subdivision of section 129 of the Code, demanding judgment for a sum certain, and the complaint states a cause of action arising upon contract, to recover unliquidated damages for the breach of a contract in the construction of a piece of machinery, the summons must control, and the complaint is irregular. (*Garrison agt. Carr*, ante, 187.)
2. Where, in such case, the defendant, after service of the complaint, obtains an *extension of time to answer*, he waives the irregularity in the complaint. (*Id.*)
3. Evidence of a mere sale and delivery by the plaintiffs of their own goods to the defendants, is not sufficient to sustain an action to recover for money laid out and expended by the plaintiffs, and for their commissions as the servants and agents of the defendants in the pur-

chase of goods for such principals, and by their order. (*Field agt. Symes*, 2 Robt. 35.)

4. Where the sole cause of action set forth in the complaint was for *money paid and expended* at the defendants' request, and for *services rendered* in buying and paying for a certain number of guns, and the defense was that the only transaction between the parties was a *purchase and sale of guns*, which was void because not in writing; and the case proved was not the employment of an agent, but either a purchase from a vendor, or an order to manufacture: *Held*, that the contract set out in the complaint was not proved, but was disproved, and the complaint should have been dismissed for that reason. (*Id.*)
5. *Held, also*, that the claim made in the complaint so entirely varied, in its scope and meaning, from that proved, that the defendants would have been entitled to a dismissal of the complaint, if they had put their motion on that ground. (*Per ROBERTSON, Ch. J.*) (*Id.*)
6. Where the cause of action set forth in the complaint was a breach of a covenant for renewal contained in a lease, and the only relief demanded was judgment for a specified sum as damages: *Held*, that the only cause of action cognizable by the court was that stated in the complaint, and that it was therefore immaterial whether or not the evidence made out a case for specific performance. (*Ryder agt. Jenny*, 2 Robt. 56.)
7. Whatever objections to a complaint a defendant, by answering, waives, he does not waive the objection that it does not state facts sufficient to constitute a cause of action. (*Gray agt. Palmer*, 2 Robt. 500.)
8. A complaint, in an action against an insurance company, is not demurrable for omitting to allege that the defendants have express authority, by their charter, to make contracts of insurance. (*Feeny agt. The Peoples Fire Insurance Company*, 2 Robt. 599.)

COMPOSITION DEED.

1. A secret arrangement by a debtor with one of his creditors, to induce him to sign a composition deed with other creditors, by which he gave to such creditor his note for the balance of the debt over and above the per cent named in the composition deed, is fraudulent; and the note so given is void in the hands of the party thereto. (*Lawrence agt. Clark*, 36 N. Y. R. 128.)

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2. A party receiving such note on a precedent debt, without surrendering or relinquishing any security or right in respect to it, is not a *bona fide* holder of the same. (*Id.*)

CONSIDERATION.

1. Consideration of a deed stated as "natural affection," and "one dollar." (*Morris agt. Ward*, 36 N. Y. R. 587.)

CONSIGNOR AND CONSIGNEE.

1. When a consignee has received and made advances upon goods in the usual course of his business, without notice of any fraud practiced by the consignor in obtaining the same, he is to be deemed a *bona fide* holder, without respect to the character of the contract made by him with his consignor. (*Williams agt. Tilt*; 36 N. Y. R. 319.)

CONSTITUTIONAL LAW.

1. Questions of the *constitutionality* of a law are never considered in this court, unless necessary to the determination of the appeal. (*People agt. Supervisors of New York*, ante, 379.)
2. The amended charter of 1857, of the city of New York, provides that, to make the proceedings of the common council legal and binding, they must be advertised for a certain specified time in the corporation newspapers. (*Wood agt. The Mayor, &c.*, ante, 501.)
3. Where a newspaper was designated as one of such papers, with instructions that it should publish the proceedings of the different boards, and services thereunder were performed before the law of May 4, 1866, called the tax levy law, was passed, and the plaintiff's rights had accrued and were vested:
4. Held, that the 10th section of the act of May 4, 1866, could not act retrospectively so as to affect the plaintiff's right to recover for such services. (*Id.*)
5. Section 10 of the act of May 4, 1866, providing that the mayor, &c., of the city of New York, shall not be liable upon any contract or expenditure, &c., made by any board or officer of the corporation, not expressly authorized by that act, is *unconstitutional and void*, as embracing a subject not contained in the title of the act, and is no answer to an action for services of an attorney performed for the corporation. (*Smith agt. The Mayor, &c.* ante, 508.)
6. The law establishing the Capital Po-

- lice District is constitutional. (*People agt. Shepard et al.* 36 N. Y. R. 285.)
7. The act of the legislature "to provide for compensating parties whose property may be destroyed in consequence of mobs or riots," passed April 13, 1855, does not conflict with any provisions in the state or federal constitution, and is a valid law. (*Daridson agt. The Mayor, &c., of New York*, 2 Robt. 250.)
8. The objection that a statute was not constitutionally passed by ayes and noes, during the presence of the required number of members, must be set up by answer; otherwise it is unavailable. (*Darlington agt. The Mayor, &c., of New York*, 2 Robt. 274.)
9. Congress has the power to pass an act prohibiting the state judges from interfering with enlistments in the army or navy, upon *habeas corpus* (*Matter of O'Connor*, 48 Barb. 258.)
10. The 12th section of the act of the legislature of 1867 (*Laws of 1867*, ch. 806), which commits to the Board of Metropolitan Police all the powers and duties conferred by law upon the mayor, the common council, the mayor and council, and all other boards and officers of the city of New York (except the Metropolitan Board of Health), in respect to the various subjects specified in the section, and also authorizes such board of police to alter, amend, modify or repeal all ordinances in force at the time of the passage of the act, concerning the persons, occupations or matters in said section mentioned, contravenes the provision of section 2, article 10, of the constitution of this state, which declares that "all city, town and village officers, whose election or appointment is not provided for by the constitution, shall be elected by the electors of such cities, town and villages, or of some division thereof, or appointed by such authorities thereof as the legislature shall designate for that purpose," and is therefore void. (*The People agt. Acton*, 48 Barb. 524.)
11. The legislature cannot confer the power to discharge duties, and make regulations and pass laws relating thereto, upon state officers, no matter how appointed, whether by the governor and senate, or by the legislature. And although the legislature might have the power to take the discharge of such duties from the mayor or common council of New York, they were required to place the performance of them with local officers or boards, and could not vest officers appointed under authority of the state with the performance of such duties. (*Id.*)

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CONTEMPT.

1. Under the statute (2 Rev. Stat. 534, o. p. § 5) relative to contempts, two methods of proceeding against a party who is guilty of a contempt, in refusing to obey a judgment in a civil action, are provided:
2. (1.) The court shall either grant an order on the accused party to show cause why he should not be punished for the alleged misconduct, or,
3. (2.) Shall issue an attachment to arrest such party, and to bring him before the court to answer for such misconduct. (*Pitt agt. Davison, ante*, 355.)
4. If the proceeding by attachment is adopted, the party is to be arrested and to be personally brought before the court, unless he give bail. On being brought before the court, or appearing pursuant to his bail bond, interrogatories are to be filed and administered, if he denies the contempt. (*Id.*)
5. Under this mode of proceeding, no order for punishment of the accused by fine or imprisonment can be made, unless he shall have been personally brought before the court, or voluntarily appeared there. (*Id.*)
6. If the proceeding by order to show cause is adopted, and it is to enforce a civil remedy, if the party in default has already had the opportunity of contesting his liability to perform what the proceeding seeks to compel him to perform, such proceeding is in effect but the execution of the judgment or order against him. (*Id.*)
7. It is a proceeding in the action, and all the papers are to be entitled in the action. The order to show cause, in the absence of any statutory provision to the contrary, is governed by the practice of the court in regard to orders to show cause, both in respect to its service and the further proceedings upon it. (*Id.*)
8. Under such practice, it is good service to serve it on the accused party's attorney in the action, even after judgment. (*Id.*)
9. Under sections 418 and 285 of the Code, the papers to bring the party into contempt, necessary, in this case, to be personally served on the defendant, are the certified copy of the judgment and the summons, and the underwriting of the referee requiring the defendant to appear before him and make the conveyance. (*Id.*)
10. When these are personally served, if the defendant refuses to comply, he is brought into contempt. (*Id.*)
11. The 12th section (2 R. S. 278, o. p.), which provides that "contempts committed in the immediate view and presence of the court may be punished summarily, and in other cases the party charged shall be notified of the accusation, and have a reasonable time to make his defense," is by the succeeding 14th section held not to apply to any proceeding against parties or officers, as for a contempt to enforce any civil right or remedy. (*Id.*)
12. In a proceeding by order to show cause, interrogatories are not necessary; for, if the court have obtained jurisdiction of the person of the defendant in the manner above provided, it retains that jurisdiction, for all purposes of enforcing the judgment, until its requirements are fully performed and executed. (*Id.*)
13. After judgment obtained, no matter what would have constituted a defense to the judgment, and if in due time and manner brought before the court would have prevented it, can be allowed as a reason why it should not be enforced. (*Id.*)
14. There is a manifest distinction between proceedings to enforce criminal contempts and those to enforce civil remedies. (*Id.*)
15. The case of *Pitt agt. Davison* (37 Barb. p. 100) reversed, and *Pitt agt. Davison* (12 Abb. p. 385) affirmed, and *Davison's Case* (13 Abb. p. 199) sustained. (*Id.*)
16. An attachment issued under the Revised Statutes entitled "of proceedings for contempts to enforce civil remedies," is a mere substitute for an execution against the body. It is equivalent to a *capias ad satisficendum*. (*People ex rel. Crouse agt. Cowles, ante*, 481.)
17. It is an execution in a civil action, upon which the defendant would be entitled to the *jail liberties*, under section 40 of article 3, chapter 8, part 2 of the Revised Statutes, page 433. (*Id.*)
18. Such an attachment is a mere civil process to enforce the payment of money; and is regular process for that purpose. But it seems that a female cannot be arrested or imprisoned on such process. (*Code, § 179.*) (*Id.*)

CONTINGENT INTEREST.

1. It seems, that although there are contingent interests of unborn children limited upon the estates of infants, pro-

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ceilings under the statute for the sale of such estates are valid; and the after born children in such a case would take the same interest in the substitute for the land as they would have had in the land. (*Per McCunn, J.; Robertson, Ch. J., contra.*) (*Bowman agt. Tallman, 2 Robt. 385.*)

CONTRACT.

1. A party has no right to annex any condition to the performance of a contract not specially provided for in the contract. (*Brown's Water Furnace Co., agt. French, ante 94.*)
2. Where there was an entire contract by which plaintiff agreed to furnish oilcloths and carpets, and to carpet defendant's house, and he did a part of it in an unskillful and unworkmanlike manner, the defendant is at liberty to avoid the contract and return the goods. (*Husted agt. Craig, 36 N. Y. R., 221.*)
3. In such case, where the goods have been returned by the defendant, the plaintiff cannot recover on such contract. (*Id.*)
4. In employing an agent to make sale to the government of property owned by the employer, reference may lawfully be had by the employer to the fact that the agent is of the same political party with those administering the government; that he has acquaintances and a good reputation at the place where the sale is to be made. (*Lyon agt. Mitchell, 36 N. Y. R., 235.*)
5. This is the rule where a sale is to be made to the government of articles needed by them, and where the commercial principle that the seller desires to obtain a good price, and the buyer desires to buy cheap, is understood by both parties as applying to the case. (*Id.*)
6. The case of an avowed agent for sale, is distinguished from that where there is an interference with legislative action or executive clemency, where the party does not profess to act upon commercial principles. *Norris agt. The Tool Company* (2 Wallace, 45,) disapproved. (*Id.*)
7. The plaintiff transferred to the defendants the exclusive right to use his patent invention for cleaning coffee in the States of New York, Connecticut and New Jersey, with the exception of two counties in the latter State. The consideration for this transfer was the payment of \$5,000, in cash, and the agreement to pay a certain amount for each and every bag of coffee that should pass through the plaintiff's cylinders or process. *Held*, that the defendants were not bound to run the cylinders to their full capacity; and that they were bound to pay the percentage only upon what had actually passed through the cylinders or had been subjected to the process. This view is confirmed by the other portions of the agreement in question. (*Newell agt. Wheeler, 36 N. Y. R., 244.*)
8. There must be a concurrence of the minds of the parties upon a distinct proposition manifested by an overt act. (*Trevor agt. Wood, 36 N. Y. R., 307.*)
9. The sending of a letter announcing a consent to the proposition is a sufficient manifestation of concurrence to consummate the contract. (*Id.*)
10. Where the offer is by letter or by telegram, the acceptance signified in the same manner is sufficient, irrespective of the time when it comes to the knowledge of the proposing party. (*Id.*)
11. An agreement to communicate by telegraph constitutes no warranty by either party that the telegram shall be duly received. (*Id.*)
12. Proof of the sending a telegram, and of sending by mail a letter accepting the proposition of defendants is a sufficient subscription to take the case out of the statute of frauds. (*Id.*)
13. Hinderances by one party to a contract, whereby the other party is prevented from completing his part of the contract by the time stipulated, afford a legal excuse for non-performance within such period. (*Stewart agt. Keteltas, 36 N. Y. R., 388.*)
14. An objection to the offering of any excuse by the plaintiff for not performing his part of the contract within the time stipulated, is properly overruled. (*Id.*)
15. When the work to be performed by the plaintiff could not be performed until other work was done by the defendant or his employees, the failure to have such preliminary work completed in season to enable the plaintiff to complete his within the time limited by the contract, is a sufficient excuse for the plaintiff for not completing the work within the time. (*Id.*)
16. Where there is disagreement between the parties as to a part of the work to be done under the contract, a new agreement in respect to such part is binding upon the parties, and so much thereof is taken out of the original contract. (*Id.*)

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17. If a part of an entire contract is void under the statute of frauds, the whole is void; a party will not be permitted to separate the parts of an entire agreement, and recover on one part, the other being void. (*De Beerski agt. Paige*, 36 N. Y. R., 537.)

18. So where the performance of a valid contract is made dependent upon the performance of a contract that is void under the statute, it cannot be enforced while the void contract remains unperformed. (*Id.*)

19. The interposition of the court cannot be invoked by a mere volunteer, to affirm and enforce a contract which was not made for his benefit, and to which he was neither party or privy. (*Beardsley Scythe Co. agt. Foster*, 36 N. Y. R., 561.)

20. Where a sale of land was made for a specific sum, with the condition that if the buyer sold the land for a certain other sum and realized the same, then \$500 more should be paid to the seller: *Held*, that the right to the further sum did not accrue, where an offer had been made to the seller of the required sum and refused by him, but only in the event of an actual sale and realization of the proceeds. (*Lorillard agt. Silver*, 36 N. Y. R., 578.)

21. A written agreement by which one party contracts to sell to the other certain lot of land, and "convey and release the same to him by a good and sufficient deed," binds the vendor to give a good title to the lot thus sold. (*Story agt. Conger*, 36 N. Y. R., 673.)

22. *Held further*, that if the vendor had been induced by unjust or immoral means to give a deed which, by its covenants, protected the vendee from a lien then existing against the premises, he had but performed his duty, and could have no redress in the courts. (*Id.*)

23. *Held further*, that where there is a misunderstanding as to the facts, no reformation of the contract could be had unless either fraud or mutual mistake was alleged. (*Id.*)

CONVERSION.

1. Two qualifications are indispensable to a right of pursuit in equity of property or its proceeds, when wrongfully converted into a new form: first, a violation of a trust, express or implied, or an abuse of authority; and, secondly, such a separation of the identical property, or its proceeds, from all other property

of the same kind, as to render it readily distinguishable. (*Getty agt. Campbell*, 2 Robt. 664.)

CONVEYANCE.

1. The provisions of the Revised Statutes (3 R. S. p. 15, § 51, &c.), must be construed as abolishing all trusts in land paid by one person, when the conveyance is given to another, whether for the benefit of the party paying the money, or for another, except where the conveyance is so taken without the knowledge or assent of the party whose money is so used, and excepting also the trust in favor of creditors. These provisions of the statute vest the title to the property in the alienee. (*Gilbert agt. Gilbert, ante*, 142.)

CORPORATIONS.

1. Where the plaintiff, as stockholder of an incorporated company, brings an action against a portion of the directors of the company, including the president and vice president, for damages sustained by reason of the fraudulent over-issues of the stock of the company by the defendants; to be entitled to recover, he must prove satisfactorily to the jury that the certificates of stock bought by him did not represent genuine stock, or any part of the stock of the company, but constituted part of the over-issue not authorized by its charter. (*Bruff agt. Mali, ante*, 338.)

2. Then the burden is on the defendants to remove the inference deducible from these facts, by showing that the plaintiff's certificates were issued on the surrender, or on the transfer of genuine stock. This might be difficult, but, if so, or even actually impossible, the defendants should not be heard to complain, when their own admitted culpability creates the dilemma. (*Id.*)

3. Where it is established by competent evidence that the defendants have issued false certificates of stock of the company, authenticated by them as genuine, and thrown them upon the market with fraudulent intent, *they are liable to every holder to whose hands they may come by fair purchase*. In such case, the doctrine, which is undoubtedly true, that a vendor of property guilty of fraud on its sale, or who sells with a warranty, is liable only to his vendee, and a subsequent purchaser acquires no right of action therefor, does not apply. (*Id.*)

4. Under the Code, the property of corporations created by or under the laws of

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- this state cannot be attached. (*Ferrier agt. American Glass Silvering Co.* ante, 496.)
5. When a foreign corporation, by its officers, comes within this state, it becomes subject to the laws of the state, and to the process of the courts; and where such a corporation, by its officers, is guilty of a wrong, or commits a trespass, within the state, the corporation cannot escape the consequences of its illegal acts, by setting up that it holds its existence under a foreign government. (*The People agt. The Central Railroad of New Jersey*, 48 Barb. 478.)
 6. Where a complaint in behalf of the people of this state against a foreign corporation, shows a claim of title to and jurisdiction over certain waters by the plaintiffs; that the defendants have taken possession, and are by their officers still in possession, and without authority; this is sufficient to give jurisdiction, if the process can be served on the defendant. If there is an improper service, that must be remedied by motion. (*Id.*)
 7. Although a corporation can properly enforce only such contracts as are authorized by its charter, yet, where third persons become interested by dealing with the company in good faith, believing that a particular contract was made according to its powers, every presumption and intendment is to be made in favor of the appropriate exercise of such powers, in the particular case. (*Meyer agt. Hallock*, 2 Robt. 278.)
 8. The defendant, by his promissory note, promised, twelve months after date, or sooner, if required, to pay to the plaintiff or order a certain sum (\$1,000), or such assessment on the same as the trustees of the plaintiff (an insurance company) should find it necessary to impose, for the purpose of paying losses upon policies of insurance agreeably to the terms of his subscription to a guaranty fund of such company. By the subscription paper so referred to, the subscribers agreed to contribute to a fund for the indemnity of persons insured by such company, as a security, in addition to expected profits, by their promissory notes, which were to be given upon condition that the same should be held by the company for the sole purpose of paying losses which should occur, and be had recourse to for any deficiency by being made subject to a *pro rata* assessment. Held, that such note not being strictly within the authority given to the plaintiff by its act of incorporation, to receive notes or other securities for premiums in ad-
 - vance; in any action brought thereon by the company, before its dissolution, it was incumbent on the plaintiff to show that the note was not in fact at variance with the statute. (*Id.*)
 9. The defendant, being one of the trustees of the company, assisted in the passage of a resolution by them which authorized the raising of a guaranty fund, "upon such terms and conditions as were not at variance with the charter and by-laws of the company." Held, that between him and creditors who gave credit to the company upon the strength of that resolution, it was to be presumed that the note conformed to the charter and by-laws of the company. (*Id.*)
 10. Held, also, that the resolution, to which the defendant was a party, or of which he had knowledge before giving his note, estopped him from urging want of authority, or non-conformity to the charter, as a defense to a creditor's suit. (*Id.*)
 11. Held, further, that an action upon the note could be sustained without the aid of the statute. That the general powers incident to all corporations, and necessary to enable them to conduct their business, authorized them to receive such note, as forming a part of their guaranty fund; and that in the hands of a receiver of such corporation, it was a valid security for the benefit of its creditors. (*Id.*)
 12. The statute of limitations begins to run, upon such a note, from the time of the making an assessment thereon and notice thereof to the maker. (*Id.*)
 13. A foreign receiver cannot sue in his own name as such in our courts; hence an action upon such a note is properly brought, in this state, in the name of the company, notwithstanding such receiver has been appointed by the court in another state, in the exercise of its equity powers. (*Id.*)
 14. A corporation, as an artificial person, is presumed to be capable of making every contract a natural person could make. When a statute contains an exception, that corporations shall have only certain enumerated powers and those given by their charters, the defendants must bring themselves within the exception. (*Ferry agt. The People's Fire Ins. Co.* 2 Robt. 599.)

COSTS.

1. Where an action is brought against public officers (Board of Health), to re-

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strain them by injunction from doing a threatened or anticipated act, alleged to be injurious to the plaintiff—the plaintiff neither claiming to recover damages, nor asking for relief, either by reason of acts done or omitted, it does not come within the statute allowing *double costs*, where the defendants succeed in the action. (*Affirming decision S. C. at Special Term*, 33 *How.* 3, and *concurring in Judge INGRAHAM's views on this point*. (*Stewart agt. Schultz, ante*, 31.)

2. The statute giving *double costs*, when adopted, applied exclusively to actions and proceedings in courts of law, and not to suits in equity; consequently it is not applicable to actions of purely equitable cognizance. (*Id.*)
3. Where an action is brought, and the complaint alleges that the plaintiffs were appointed trustees to receive subscriptions for the benefit of a public corporate institution, and claiming to recover of the defendant, who had signed a general subscription agreement, the amount of his subscription, the plaintiffs are *trustees of an express trust*, under section 113 of the Code, and are not liable for *costs, personally*, on the dismissal of the complaint. (*Slocum agt. Barry, ante*, 320.)
4. An order denying a motion to set aside an execution issued for costs against plaintiff personally, who claim to act as trustees, is *appealable*. (*Id.*)
5. In an action before a justice of the peace, for trespass on land, the plaintiff, in his complaint, described his entire farm of seventy acres by metes and bounds, and alleged the trespasses to have been committed thereon, and claimed damage in gross "for the several aforesaid trespasses and grievances;" and the defendant interposed a general denial, and then set up a separate defense, alleging title in himself to a certain portion of the premises, describing it by metes and bounds, and alleged that "some or one" of the alleged trespasses were committed on that piece of land. The justice discontinued the whole action; and on the trial in the supreme court, no evidence was given of any trespass on this particular piece of land, and no question of title was raised by the proofs, and it was found that the trespasses were committed on the plaintiff's land, as to which there was no question of title, and the damages awarded amounted to some \$26:
6. *Held*, that the defendant was entitled

to costs. (*See Hall agt. Hodskins*, 30 *How.* 15.) (*Shall agt. Green, ante*, 418.)

7. It is improper to embrace in a judgment of affirmance, costs already included in the previous judgment, but the error should be corrected on motion in the court below. (*Beardsley Scythe Co. agt. Foster*, 36 *N. Y. R.* 561.)

COUNTER-CLAIM.

1. A counter-claim, or defense of an equitable nature, may be interposed, although the claim or demand mentioned in the complaint is purely of a common law nature, or for the recovery of money only. (*The Hicksville, &c., Railroad Company agt. The Long Island Railroad Company*, 48 *Rarb.* 355)
2. If the claim and counter-claim arose out of the same transaction or contract, there is no necessity for a cross action by the defendant. (*Id.*)
3. The plaintiff sued to recover six months rent of its branch railroad, under a written lease thereof to the defendant, and the defendant set up as a counter-claim an extinguishment of the right to recover rent, arising from a tender of the purchase price of the branch road, under an option or privilege contained in the lease, before the rent accrued, &c. The lease was of the branch railroad, the land upon which the same was built, embracing the titles, &c., and generally the property "*as it now exists*" (at the date of the lease), the cost of which was \$45,304. The right to purchase was of the *demised premises*, upon payment of the said costs thereof, and all rent computed to the time of purchase; and upon payment, the said *demised premises* were to be conveyed free from incumbrance. When the tender was made, the defendant required the plaintiff to convey to the former company a *perfect title*, or to convey with *covenants of warranty* as to the title. *Held*, that the defendant, when making such tender, required more than its contract permitted; and the tender was therefore no bar to the claim for rent, and did not prevent its accruing in future. (*Id.*)
4. *Held, also*, that the plaintiff not having demanded, but on the contrary, having resisted, a specific performance in the manner claimed by the defendant, and the defendant having sought to compel the plaintiff to complete his title at an additional expense, by the tender of the cost, only, of the *demised premises*, as they existed at the date of the lease, neither party was in a condition to de-

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- mand a specific performance, in respect to a conveyance of the premises. (*Id.*)
5. Held, further, that the facts did not warrant a decree compelling the defendant to pay \$45,304, as upon an option or privilege of which it had never sought to avail itself. (*Id.*)
 6. The right to recover for money lost in betting is a demand arising on contract, and may be set up as a counter-claim, under section 150, subdivision 2, of the Code of Procedure. (*McDougall agt. Walling*, 48 Barb. 364.)
 7. A claim of the defendant not arising out of the contract or transaction set forth in the complaint, or connected with the subject of the action, but arising upon another wholly independent contract made with the plaintiff's assignor, is not the subject of a counter-claim. (*McIlvaine agt. Egerton*, 2 Robt. 422.)
 8. The Code does not allow breaches of contracts with other parties to be set up as a defense by way of counter-claim. Set-offs, under the statute, are alone applicable for that purpose; and a claim against the plaintiff's assignor, if within the provisions of that statute, may be allowed as a set-off. (*Id.*)
- COUNTY COURT.**
1. The county court has jurisdiction, upon the written consent of the parties, to order a reference in a case brought before it by appeal from a justice's court, where there is an issue of fact joined between them. (*Hyland agt. Loomis*, 48 Barb. 126.)
- COUNTY TREASURER.**
1. On application for a mandamus to compel a county treasurer to pay over moneys assessed and collected to pay town bonds, etc., it is a good defense to show that the necessary assent of the tax payers of the town was not obtained to authorize the issuing of such bonds. (*People agt. Mead*, 36 N. Y. R. 224.)
- COURT.**
1. The casual and temporary absence from the bench of one of the presiding judges, when there is a regular quorum in attendance, neither breaks up the session of the court nor impairs the validity of its proceedings. (*Tuttle agt. The People*, 36 N. Y. R. 431.)

COURT MARTIAL.

1. A court martial is a court of special and limited jurisdiction. It is called into existence for special and temporary purposes, and when these purposes are attained, it is dissolved and disappears. No general duty or power, with respect to the collection of the fines, is conferred upon the president of the court; and he is required to exercise such power as is given him in a specified way, and within a specified time. (*Matter of Wright*, ante, 207.)
2. The first warrant shall be drawn within thirty days after the fines have been imposed, and the same may be renewed, or a new one issued at any time thereafter, within two years from the time of imposing the fines. (*Id.*)
3. A warrant against a person issued on the 25th day of June, 1867; reciting that the fine was imposed upon the 25th day of April, without specifying the year, is defective upon its face, and does not justify the holding the person fined under it. (*Id.*)

COURT OF SESSIONS.

1. On an application for a writ of certiorari to remove a conviction from a court of special sessions to the court of sessions, it is not a valid objection to the conviction, to state in the affidavit: 1st. That the conviction is erroneous; for there was no complaint or affidavit in writing, under oath, made against the defendant before the issuing of the warrant upon which he was arrested. It is not necessary that complaint be made in writing in any case, before the issuing of the warrant. 2d. That there was no complaint on oath made before his arrest and the issuing of the warrant. Warrants issue on examination made by the magistrate, and not on complaint or oath, as such, and complaints are not required to be on oath, although the examination must be. 3d. That the magistrate failed and refused to reduce the testimony given, or any part thereof, to writing. It was not the duty of the magistrate to reduce the testimony to writing; it was necessary for his own protection, and for other reasons besides this, he ought to have so reduced it. But the defendant could not be injured by such omission; nor could his legal rights be affected by it. 4th. That the magistrate failed and refused to note any exceptions made by the counsel of said defendant. Exceptions were entirely unnecessary on the trial of this defendant. Any erroneous ruling of the justice whatever, against

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the objection of the party, would have been sufficient to bring the error to the notice of the appellate court. Besides, formal exceptions are never taken in any court not of record. 5th. That said trial, examination, conviction and sentence of said defendant took place and were had in a *private room*, and not in public, nor in the usual court room of the magistrate, and without the consent of the defendant. A trial is not necessarily not public because it is conducted in a private room, or is not in a court room. The trial in this case was conducted in a room adjoining part of the regular court room of the justice in the city hall, and is used for public purposes: it being in fact the office of the justice, in a public building, furnished to him by the public for the transaction of public business. The statute providing that the sitting of every court in this state shall be public, and every citizen may freely attend the same, was not violated in this case. (*Matter of Boswell, ante*, 347.)

2. The court of general sessions of the city and county of New York have the power to grant new trials upon the merits and on the ground of newly discovered evidence. The act of 1859 (*Laws of 1859, ch. 339, § 4*), which grants to the courts of sessions of the several counties of the state the power to grant new trials, extends to the court of general sessions in the city and county of New York. (*Lancigan agt. The People, ante*, 390.)

COVENANT.

1. If too ambiguous, a specific performance will not be decreed. (*Buckmaster agt. Thompson, 36 N. Y. R. 558.*)

CREDITOR'S ACTION.

1. In an action to reach the property of a judgment debtor to satisfy a judgment, it was held, that it was a fatal defect to the complaint that it did not aver that the execution issued upon the judgment had been returned unsatisfied, in whole or in part. (*Beardsley Scythe Co. agt. Foster, ante*, 97.)
2. In a creditor's action, brought to set aside an assignment, by one defendant to another, of the property of a special partnership, where no answers have been put in, or pleadings between the defendants, no proofs have been taken on the main subject of litigation between the plaintiff and defendants, and there is nothing to show whether judgment was obtained by the plaintiffs against the defendants, or any of them,

by default; or any issues formed between them, of law or fact, or any disposition made of such issue; the court has no jurisdiction or power to give judgment in favor of one defendant against two others, merely upon the confirmation of a referee's report, finding a certain sum due from the latter to the former. (*Stephens agt. Hall, 2 Robt. 674.*)

3. To sustain an action in the nature of a creditor's bill, it must appear that the condition of the statute has been complied with, by exhausting the usual remedy of law. (*Beardsley Scythe Co. agt. Foster, 36 N. Y. R. 561.*)

CRIMINAL JURISDICTION.

1. For the purposes of criminal jurisdiction, an offense is committed on the boundary between adjacent counties, if perpetrated within five hundred yards of the boundary line. (*People agt. Davis, 36 N. Y. R. 77.*)
2. Under existing laws, the commissioners of excise cannot license the sale of spirituous liquor by a non-resident of the town. (*Id.*)

CRIMINAL LAW.

1. Where it was objected to the charge of the judge on a trial for murder in the first degree, that he omitted to advise the jury that there was not sufficient evidence of *premeditation* to warrant a verdict of murder in the first degree:
2. Held, that it was a sufficient answer to this objection that no such objection was made at the trial, and consequently no refusal and exception. (*McKee agt. The People, ante*, 230.)
3. The act of 1855, as amended in 1858, has no application to trials in courts of oyer and terminer. It is only when a conviction for a capital offense has taken place in the court of *general sessions of the peace* in and for the city and county of New York, that the court of appeals are authorized to grant a new trial, "whether any exception shall have been taken or not to the court below." (*Id.*)
4. Every thing which happened at the time of the homicide, in the immediate presence and hearing of the prisoner, including the whole conversation which then occurred, is material evidence, as a part of the *res gestae*. (*Id.*)
5. It is no error for the judge, at a criminal trial, to refuse to strike out testimony which is wholly immaterial and irrelevant, and which could not under

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- any theory have worked any prejudice to the prisoner. (*Id.*)
6. The declaration and statements of the prisoner cannot be given in evidence, on his own behalf, for any purpose whatever. (*Id.*)
6. On an application for a *writ of certiorari* to remove a conviction from a court of special sessions to the court of sessions, it is not a valid objection to the conviction, to state in the affidavit:
7. That the conviction is erroneous, for there was no complaint or affidavit in writing under oath, made against the defendant before the issuing of the warrant, upon which he was arrested. (*Matter of Edward Boswell, ante, 347.*)
 8. It is not necessary that complaint be made in writing in any case, before the issuing of the warrant. (*Id.*)
 9. That there was no *complaint on oath* made before his arrest and the issuing of the warrant. (*Id.*)
 10. Warrants issue on *examination* made by the magistrate, and not on complaint or oath, as such, and complaints are not required to be on oath, although the examination must be. (*Id.*)
 11. That the magistrate failed and refused to reduce the testimony given, or any part thereof, to writing. (*Id.*)
 12. It was not the duty of the magistrate to reduce the testimony to writing; it was necessary for his own protection, and for other reasons besides this, he ought to have so reduced it. But the defendant could not be injured by such omission; nor could his legal rights be affected by it. (*Id.*)
 13. That the magistrate failed and refused to note any *exceptions* made by the counsel of said defendant. (*Id.*)
 14. Exceptions were entirely unnecessary on the trial of this defendant. Any erroneous ruling of the justice whatever, against the objection of the party, would have been sufficient to bring the error to the notice of the appellate court. Besides formal exceptions are never taken in any court not of record. (*Id.*)
 15. That said trial, examination, conviction and sentence of said defendant, took place and were had in a *private room*, and not in public, nor in the usual court room of the magistrate, and without the consent of the defendant. (*Id.*)
 16. A trial is not necessarily not public, because it is conducted in a private room, or is not in a court room. The trial in this case, was conducted in a room adjoining part of the regular court room of the justice in the city hall, and is used for public purposes: it being in fact the office of the justice, in a public building, furnished to him by the public for the transaction of public business. (*Id.*)
 17. The statute providing that the sitting of every court in this state shall be public, and every citizen may freely attend the same, was not violated in this case. (*Id.*)
 18. The court of general sessions of the city and county of New York, have the power to grant new trials upon the merits and on the ground of newly discovered evidence. The act of 1859 (*Laws of 1859, ch. 339. § 4*), which grants to the courts of "sessions of the several counties of the state, the power to grant new trials, extends to the court of general sessions in the city and county of New York. (*Lanigan agt. The People, ante, 290. Id.*)
 19. A prosecuting officer cannot be compelled to elect upon which count, in an indictment for homicide, he will ask a conviction. the indictment containing several counts, alleging a killing in three different ways. A general verdict of guilty is not repugnant, inconsistent or void. (*Id.*)
 20. Construction of the act of April 12, 1862, as to what constitutes the difference between the two degrees of murder. (*Id.*)
 21. Premeditation proves a malicious intention when applied to a homicide, and when the killing occurs with an intent to effect death, however instantaneously, the intent is formed prior to the commission of the deed. (*Id.*)
 22. The legislature intended the application of the term "premeditated" to an intent formed on the instant of killing. (*Id.*)
 23. Intoxication must result in a fixed mental disease of some continuance or duration, before it will have the effect to relieve from the responsibility for crime. (*Id.*)
 25. The mere fact that the sheriff has expressed his opinion that the prisoner is guilty, in a criminal case, is not a ground of challenge to the array. It is necessary for some other fact to be alleged, in the challenge, to render the charge material; as that the sheriff has intentionally omitted to summon some juror, or has stated his opinion to some juror. (*Ferris agt. The People, 48 Barb. 17.*)

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26. Mere irregularities in drawing and summoning the jurors, not shown to have prejudiced the prisoner, are not a ground of challenge to the array, where there is no charge of fraud or corruption in any of the officers who drew or summoned the jurors, or certified the list. (*Id.*)
27. Nor is it a ground of challenge to the array, that the court excused and excluded 764 of a panel of 1000 jurors drawn, from attendance, without reasonable cause shown; the act being within the proper discretion of the court. (*Id.*)
28. No venire is necessary, in criminal cases. The writ has been expressly abolished in civil cases; and jurors in criminal cases are required to be summoned in the same manner as in civil cases. (*Id.*)
29. A plea of a former indictment for the same offense, arraignment thereon, plea of not guilty, and the commencing of the trial, when the same was abandoned, without going to the jury, is no bar to a second indictment. (*Id.*)
30. Where no objection is made in the court of general sessions of New York, that the trial was had after the close of the third week of the term, it cannot be urged as a ground of objection on writ of error, that no order for the continuance of the term appears on the record of judgment. The omission to incorporate that fact in the record, does not show that the order was not duly entered on the minutes of the court. It is not necessary it should be included in the record; and every intendment is in favor of the regularity of the proceedings. (*Id.*)
31. Where a juror on the trial of an indictment for murder, on being challenged for principal cause, stated that he had read a statement in the newspaper, of the homicide, but that although he had an impression that a homicide was committed, he had none as to the guilt or innocence of the prisoner: *Held*, that the challenge was properly overruled. (*O'Brien agt. The People*, 48 Barb. 274.)
32. The prisoner then challenged the juror for favor, and demanded triers. These having been sworn, the juror again testified that he had read the statement in the newspaper, without any impression remaining on his mind, of the guilt or innocence of the prisoner; that "it would require evidence, either the one way or the other, to make him convinced of the prisoner's guilt or innocence." The prisoner's counsel requested the judge to charge that the challenge was well taken, as matter of law. The judge declined so to do, and submitted the question of the impartiality of the juror to the triers. *Held* there was no error in this; and that it was properly given to the triers to decide that question. (*Id.*)
33. Another juror, being challenged for principal cause, testified that he had conscientious scruples in finding a verdict where the penalty was death; but that his scruples would not prevent him from finding a verdict of guilty of murder, where the evidence required him to do it: *Held*, that the juror was properly set aside as incompetent. (*Id.*)
34. Where a juror states that he has conscientious scruples against finding a verdict involving the penalty of death, he is directly within the inhibition of the statute, as to jurors serving who hold such scruples. (*Id.*)
35. When a juror has conscientious scruples in finding such a verdict, his competency is not established or restored by a statement that he would render a verdict of guilty, if the evidence required it. (*Id.*)
36. A juror being challenged by the prisoner's counsel for favor, testified that he thought he read or heard the statement of the homicide, published in the paper, and believed that a homicide was committed by the person charged in the paper, but it left no impression on his mind, as to the guilt or innocence of the party: *Held* that the challenge was properly overruled; the result of the evidence being that there was no impression on the juror's mind, as to the guilt or innocence of the prisoner; the person charged in the paper not being identified as the prisoner. (*Id.*)
37. An indictment charged the prisoner, in one count, with the murder of *Lucy McLaughlin*, and in another with the murder of *Kate Smith*. The counsel for the prisoner moved the court that the prosecution be required to elect upon which count the prisoner should be tried. The court reserved the question. It was proved that the deceased was usually known by the name of *Kate Smith*, but there was some evidence tending to show that her name was *Lucy McLaughlin*. At the close of the evidence the prosecution entered a *nolle prosequi* as to the count charging the murder of *Lucy McLaughlin*, and the jury found the prisoner guilty, upon the other count, of the murder of *Kate Smith*. *Held* that there was no error in this. (*Id.*)
38. Confessions are excluded only when

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- they are made under circumstances that tend to produce doubt as to their truth, arising from the operation of hope or fear in the mind of the prisoner. When made under the effect of threats, or the sanction of an oath, without the proper caution being given that he need not answer, and that what he says may be used against him, and some other circumstances, the admissions are excluded, as matters of law. (*Id.*)
39. But where the admissions are purely voluntary, they are to be submitted to the jury for what they may be deemed worth. (*Id.*)
40. A non-professional witness was asked for his opinion as to the mental condition of the prisoner, at the time of the occurrence. His opinion was excluded. *Held* that the ruling was correct.
41. When insanity is interposed as a defense, it is not incumbent on the people to establish the sanity of the prisoner at the time of the commission of the offense, by affirmative evidence. (*Id.*)
42. On a trial for murder the prisoner has no right to ask the court to charge the jury that they may infer, from the presence of intoxication, the absence of premeditation. (*Id.*)
43. A charge that "if there be sufficient deliberation to form a design to take life, and to put that design into execution by destroying life, there is sufficient deliberation to constitute murder, no matter whether the design be formed at the instant of striking the fatal blow, or whether it be contemplated for months," is a very sufficient definition of murder in the first degree, when occurring with premeditation. (*Id.*)
44. *Delirium tremens*, like insanity, if it deprives one of the capacity to know what he is doing, or of knowing right from wrong, saves him from any criminal responsibility for his acts. (*Id.*)
45. On the trial of an indictment for robbery, the defense was an *alibi*. The evidence of two witnesses tended to show that when the crime was committed, at half past ten o'clock in the morning of July 30th, the prisoner was at home, at his mother's house, in bed. The judge, in charging the jury, substantially told them that it was for them to determine whether they believed the witnesses who had testified to the *alibi*; that it was singular that a boy like the prisoner should be in bed from seven to half past eleven in the morning, in July, unless he was sick; or there was some other special reason; and that the circumstance that neither his mother, nor any one of his family, had been called to show that he was sick, or to explain the fact of his thus being in bed, might or "would probably turn the scale." *Held* that, looking at the whole charge, the inference was that the judge meant, and that the jury understood him as meaning, that on the question as to the credit they would give to the witnesses who had undertaken to prove an *alibi*, the circumstance mentioned by the judge might or probably would turn the scale. And that that the language, though strong, afforded no ground for granting a new trial. (*McGroarty v. The People*, 48 Barb. 466.)
46. The judge, in his charge, also said: "A crime of this kind is generally perpetrated at night, but this was in broad day light, at half past ten o'clock, in one of our public thoroughfares; a child with money in his pocket, taken up and carried in an alley, knocked down, robbed and left. If they are guilty, they deserve a severity of punishment greater than any punishment that has been imposed this term, on any person tried. There is some excuse at night when an attack of that kind is made, but it is a much graver offense, and requires graver consideration where they are so desperate as to make it in broad day light." *Held* that there was no error in this; that it was plain the judge merely meant to say, that to commit a robbery like that with which the prisoners were charged, in broad day light, &c. showed a greater boldness, hardihood or recklessness in crime, than committing a like robbery under cover of the night. (*Id.*)
47. On the trial of an indictment for murder, the judge charged the jury that they were to decide "whether it was murder, or whether it was a case of justifiable or excusable homicide." After defining the crime of murder, he told them the intent must be clearly proven, or they could not convict of murder. He then explained to the jury the law as to justifiable and excusable homicide, and submitted to them whether the prisoner was justified in using a deadly weapon. He also told the jury if they had any doubt as to which degree of murder to convict the prisoner of, it was their duty to convict of the lesser degree of guilt. That if they had any reasonable doubts that the prisoner intended, at the time the blow was struck, to take life, and they believed it was done in the heat of pas-

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sion, than they could convict of the lesser degrees. *Held* there was no error in the charge. (*Manuel v. People*, 48 Barb. 548.)

48. In criminal cases the court is required to order a new trial, if it is satisfied that the verdict is against evidence, or against law, or that justice requires a new trial. (*Id.*)

49. Where the court, upon a writ of error, came to the conclusion from an examination of the evidence, that under any view to be taken of the case, the homicide was only one of killing in the heat of passion, arising out of a sudden quarrel, without a design to effect death, by a dangerous weapon, and therefore was only manslaughter in the third degree; *Held* that a conviction of murder in the first degree was not warranted by the evidence, and that under such circumstances it was the duty of the court to order a new trial. (*Id.*)

DAMAGES.

1. Where in an action against a common carrier for damages by reason of negligence and fault in carrying the plaintiff for hire, where there is sufficient evidence to make it the duty of the jury to determine whether the plaintiff's sickness and loss of time were occasioned by the fault of the defendant, his agents or servants, the jury are authorized to allow him compensation therefor, although the plaintiff has given no evidence upon that point. (*Ward agt. Vanderbilt*, ante, 144.)

2. In an action on the case, to recover damages for the act of the defendant in enticing the plaintiff's son away from the service of the plaintiff, without the knowledge or consent of the latter, and inducing him to enlist in the army for three years, as a substitute for the defendant, who had been drafted for such service, the rule of damages is, that the plaintiff can only recover for the loss of service up to the time of the commencement of the action, or at most, to the time of the trial. (*Covett agt. Gray*, ante, 450.)

3. In such an action, the law does not allow *punitive* or *exemplary damages*. The foundation of the action is the *loss of service*, and the recovery should be the damage sustained. (*BALCOM, J.*, dissenting on both points. See his opinion.) (*Id.*)

4. It seems there is no uniform rule of damages to apply to the various cases in *tort* which continually come before

the courts for adjudication. (*Edwards agt. Beebe*, 48 Barb. 106.)

5. The courts do not, however, favor the doctrine of giving anything more than the necessary and unavoidable damages in cases of *tort* without aggravation. (*Id.*)

6. Where the referee allowed the plaintiff damages to the extent of the value of his horse, lost by occasion of a collision of boats at Schenectady, and added thereto interest up to the time of making his report, *held*, that it was error to allow another sum as damages for the loss of the use of the plaintiff's horse in towing his boat to Rome. (*Id.*)

DEATH BY NEGLIGENCE.

1. Where a man engages in a dangerous enterprise, he accepts its ordinary risks, and is bound to foresee and submit to the consequences usually attending it. (*Curren agt. Warren Chemical and Manufacturing Co.* 36 N. Y. R. 153.)

2. In an action brought to recover damages for death occasioned by the wrongful act, neglect or default of defendant, the plaintiff must show that deceased came to his death without fault on his part. (*Id.*)

3. The mere fact that the person was killed on defendant's premises imposes no duty upon defendant to explain the cause of the person's death. (*Id.*)

4. When the death was occasioned by the accumulation of foul air or gas within a boiler in which deceased worked, and it appeared that the accumulation was occasioned by the closing of a ventilator by the direction of the deceased, it was held that his own carelessness, etc., contributed to the accident, and that plaintiff could not recover. (*Id.*)

DEBTOR AND CREDITOR.

1. A man confessedly in embarrassed circumstances, and, as the result shows, insolvent, seeing that a firm of which he is a member must probably fail, may lawfully appropriate his private property to the payment primarily of his private debts, in preference to the partnership debts, by conveying and transferring such property to his private creditors, in payment of their just demands; and such conveyances and transfers will be valid; where there is nothing to impeach the good faith of the grantees, or tending to show that they were privy to any con-

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cealment or fraudulent intent or purpose on the part of the grantor, in disposing of his property. (*The Auburn Exchange Bank agt. Fitch*, 48 Barb., 692.)

2. An individual may, at all times, convey or turn out his property in payment of his just debts; and this is none the less true because he is straitened in his circumstances and is unable to pay all his creditors. At such times he may honestly prefer one creditor to another; and if he sells and conveys his property for a fair price, in payment of his just debts, the legality of the conveyances or transfers cannot be questioned. Fraud cannot be predicated upon such a transaction, on the assumption that the debtor meant to defraud his creditors. (*Id.*)
3. An intent on the part of the grantees to defraud, or to concur in, or aid in carrying out or consummating any fraud on the part of the grantor, cannot be imputed or inferred from the fact that such grantees did in fact receive transfers of all the property of the grantor, and must have known that his other creditors could not be paid. (*Id.*)
4. The law is not so unjust as to forbid a son from paying the honest debt to his mother, by a conveyance to her of his family residence; nor is it so unreasonable as to require her to turn her son into the street, at the peril of losing the estate. *Per E. D. Smith, J.* (*Id.*)
5. An assignment in trust for the benefit of creditors, made to an attorney, is not rendered void by the insertion of a clause directing the assignee to pay and disburse, first out of the proceeds of the assigned property, "all the just and reasonable expenses, attorneys fees, costs, charges and commissions of making, executing," &c. the assignment. (*Icelin agt. Dalrymple*, 2 Robt., 142.)
6. A provision, in an assignment of property in trust for the benefit of creditors, directing the assignees, after converting the assigned property into money, out of the proceeds "to protect, save harmless and indemnify the party of the second part of and from the payment of any sum by reason of his having executed a covenant of suretyship," for the payment by the assignors of certain sums, due at various periods within four years, although a trust to pay certain sums not yet due, does not render the assignment void. (*Loeschigk agt. Jacobson*, 2 Robt., 645.)
7. In an action by judgment creditors, to set aside as fraudulent a transfer of

goods and debts made by the judgment debtor, the question of the invalidity of the transfer, though precedent to any liability of the assignee for the amount of the plaintiffs' claim, is immaterial, unless, he has in his hands some proceeds of sales, or some debts or goods for which he is bound to account. In such an action the quantity and kind of goods and character of debts, as well as the amount of the proceeds, should either be proved, on the trial, or left for determination by a referee; the court, in the meantime, rendering a contingent judgment dependent upon the amount found by the referee to be due. (*Kaup agt. Bridge*, 2 Robt., 459.)

8. In order to warrant such a contingent judgment, however, it should either appear that there are goods remaining unsold, and debts uncollected, in the hands of the assignee, or he must be determined to be responsible for such proceeds. (*Id.*)
9. If the goods have been sold by him, before the commencement of the action to recover such proceeds by the judgment creditor, and before the issuing of execution on his judgment, and the assignee has nothing in his hands applicable to the payment of the plaintiffs' claim, except the proceeds of goods and debts received by him before the issuing of the plaintiffs' execution, such proceeds are not liable for the judgment creditor's claim. (*Id.*)

10. Where a fraudulent purchaser of goods has sold them, the courts have in no case made him liable for their proceeds, as proceeds of property belonging to his vendor, which ought to be applied to the payment of his debts. (*Id.*)

DEED.

1. A conveyance made to children, for love and affection, is not fraudulent or void against subsequent creditors if, at the time of the conveyance, the grantor had sufficient property, otherwise, to pay then subsisting debts. (*Holmes agt. Clark*, 48 Barb., 237.)
2. Such a conveyance would be void as to existing creditors at the date of the conveyance, if their debts were not otherwise paid. (*Id.*)
3. It is not necessary that the grantee should be a participant in the fraud, to avoid the deed. Though he may have received the conveyance honestly, and in ignorance of the fraud, the conveyance may be void. (*Id.*)

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4. If he grantee, without knowledge of the intended fraud, becomes the purchaser for value, he should be protected, although the grantor acted from fraudulent motives. (*Id.*)
5. A grant made without other consideration than love and affection cannot be set aside in favor of creditors not being such until two years after the conveyance; unless the transaction was fraudulent as between the parties, and made to defraud subsequent creditors. (*Id.*)
6. Where the facts, as stated in the plaintiffs' opening, were that the conveyance sought to be set aside was made by the grantor, to her infant children, in 1861; that A. and M. were creditors of the grantor, at the time of the conveyance, and as such had obtained a judgment declaring the conveyance void as to them; that the indebtedness of the grantor, to the plaintiff, did not exist until the close of 1863; and there was no allegation of insolvency, other than as to A. and M., and none that it continued until the debt to the plaintiffs was contracted: *Held* that the judge properly dismissed the complaint. (*Id.*)
7. *Held*, also, that the plaintiffs should have shown either that their claim was for a subsisting indebtedness, or that the conveyance was made with intent to defraud subsequent creditors, which was to be inferred from the proof of fraudulent intent on the part of the grantees, as well as of the grantors. (*Id.*)
8. Legal proof of the identity of the persons appearing before an officer for the purpose of acknowledging the execution of an instrument, is necessary, when the officer has no previous knowledge of them. A mere introduction, at the time, is not sufficient. (*Jones agt. Bach, 48 Barb., 568.*)
9. When this previous knowledge does not exist, the officer must take satisfactory evidence, under the solemnity of an oath or formal affirmation, of the identity of such person. (*Id.*)
10. The covenant of *seisin* is only a guaranty against a title existing in a third person, which might defeat the estate granted; not against a possible judgment of a court, which may invalidate a proceeding through which the grantor obtained his title. (*Colt agt. McReynolds, 2 Robt., 655.*)
11. Such a covenant is broken, if at all, *at the time it is made*. It cannot be broken afterwards. Whatever may subsequently occur, to defeat the title,
- whether the act of the party, or the judgment of a court, the covenant cannot be effected. (*Id.*)
12. If the covenant is complied with, when made, it must always remain so. If the possession of the grantee is afterwards disturbed, he must resort, for redress, to some other remedy. (*Id.*)
13. A lot of land was conveyed, the title to which was derived under a deed from the sheriff, executed in pursuance of a judgment of foreclosure and a sale thereunder to the grantor in such conveyance. After such conveyance, upon the application of the holder of a prior mortgage, the sale under the judgment was set aside, and the judgment opened. Subsequently, a prior mortgage was foreclosed, the grantee in such conveyance being a party defendant in the action, and the premises were again sold, by which such grantee lost the property. *Held* that the effect of the order setting aside the sale, and opening the judgment was to restore the lien and operation of the two prior mortgages; but that it did not operate as a *disseisin* of the purchaser's title; at least so as to relate back, and work a breach of the covenant of *seisin* in his deed to the purchaser from him. (*Id.*)

DESCENT.

1. According to the statute of descent, the father inherits the whole estate of his intestate son, unmarried, and dying without issue, unless the inheritance came to the intestate on the part of his mother, in which case the father takes only a life estate. (*Morris agt. Ward, 36 N. Y. R., 587.*)
2. Where the estate was a gift from the grandfather on the side of the mother, to the mother for life, with remainder ever to her lawful issue, and to their heirs forever: *Held*, that the estate came to the intestate on the part of the mother. (*Id.*)
3. Where the consideration mentioned in the trust deed is for "natural love and affection to said Emily" (the mother), "and of one dollar," the pecuniary consideration named will be deemed to be merely formal where such fact appears most provable from the context, and will not change the character of the deed from a gift to that of a purchase. (*Id.*)

DESERTERS.

1. The act of Congress authorizing the arrest of persons as deserters, being

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in derogation of the common law, must be strictly pursued. The duties imposed by it are ministerial, and in the proper discharge of them the officer is bound to embrace the first opportunity to bring the prisoner before a competent tribunal, where he may be tried for the offense charged. (*Hawley agt. Butler*, 48 Barb., 101.)

2. Where the plaintiff was arrested, without warrant, by a deputy provost marshal, on the charge of being a deserter, and taken by him to the office of the provost marshal, who, after examination, directed the deputy marshal to convey the plaintiff to the county jail, where he was kept in close confinement for several days: *Held*, that in so doing, the marshal and his deputy acted in violation of the statute and exceeded their authority, and were liable to an action. That they had no legal right to make such an unreasonable detention, before sending the plaintiff to a military commander, or a military post. (*Id.*)

DEVISE.

1. A devise made in 1684 "to the elders or overseers of the Nether Dutch Reformed Congregation within the city of New York, to the proper use and behoof of the minister of the Nether Dutch Reformed Congregation within the city of New York, for the support and maintenance of their minister, ordained according to the church orders of the Netherlands," is a devise to that particular church and congregation, for the purposes specified; and not to the ministers of that denomination generally. (*Attorney-General agt. The Minister*, 36 N. Y. R., 452.)
2. The charter granted by the king in 1634 upon the petition of this church and congregation for that purpose, whereby it was ordained "that the then minister, elders and deacons, and all such others as then were or thereafter should be admitted to the communion of the Reformed Dutch Church in the said city of New York, should, from that time, and at all times thereafter, be a body politic and corporate by the name of the ministers, elders and deacons of the Reformed Protestant Dutch Church of the City of New York, and their successors, in trust for the sole and only use, benefit and behoof of them, etc., and other members in communion of the said Reformed Dutch Church of New York and their successors forever, was an incorporation of the particular church petitioning only, and was not an incorporation of

the denomination, not members of said church. (*Id.*)

3. Where, by the terms of the will, the legal title of the estate devised is vested in the defendants, who are the sole beneficiaries, if there remains a surplus after the trusts of the will are fully satisfied, such surplus follows the legal title, discharged of the trusts of the will. (*Id.*)

DISCOVERY OF BOOKS AND PAPERS.

1. A stockholder in an incorporated company, cannot be deprived of the right to inspect the books of the company, because they are kept in a particular way, or because they contain along with the information to which he is entitled, other information which he has no right to demand. (*People agt. Pacific Mail Steamship Company*, ante 193.)
2. If a corporation does not keep the books which the statutes prescribe, it is its duty to permit an inspection of such as it does keep for the purpose of recording the transactions which the statutes give the stockholders the right to know. And such inspection may be enforced by mandamus. (*Id.*)

DIVORCE.

1. In an action for a separation from bed and board forever, on the ground of cruel and inhuman treatment, the continuance of cohabitation by the parties for a limited time, after the last act of cruelty proved, is not, as in the case of an action for divorce, conclusive of the fact of condonation. (*Reynolds agt. Reynolds*, ante 346.)
2. An act of condonation, to be effectual, must be one to which both husband and wife assent, and in which each participates. An unaccepted offer of the wife to return to the matrimonial bed is not, of itself, a condonation, but only an expression of a willingness to condone. (*Betz agt. Betz*, 2 Robt., 694.)
3. The mere expression of a desire on the part of the plaintiff to make an agreement with the defendant, whereby the injury shall be condoned at a future period, and on the latter's assenting to and performing certain conditions, is not an absolute condonation. (*Id.*)
4. The term "condonation" necessarily includes that operation of the mind, evinced by words or acts, known as forgiveness; the free, voluntary and

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full remission of a matrimonial offense. Unless accompanied by that operation of mind, even cohabitation without fraud or force, is insufficient to establish a condonation. (*Id.*)

5. Where the offer of a wife to return to her husband was made for the purpose of obtaining a support for herself and her child during the pendency of the suit, and because the order of the court required her to do so, as a condition upon which such support was to be obtained; such support being obtained by the court as a substitute for an award of alimony during the progress of the suit, and being so accepted and acted upon by the wife; *Held* that this did not amount to a condonation. (*Id.*)
6. An allowance to the wife, in an action for a divorce *a vinculo*, pending the suit, is always relatively smaller than a permanent provision after decree. As a general rule, temporary alimony ought to be limited to the wife's actual wants. (*Simmons* agt. *Simmons*. 2 *Robt.*, 712.)
7. Where the real estate of the husband is quite sufficient for the security of the support of the wife during the litigation, and for the payment of such alimony as will probably be awarded by the final decree, he will not be restrained by injunction from selling or disposing of, during the pendency of the suit, a pair of horses and two carriages with which the wife had been furnished by her husband for her own separate use, while they lived together. (*Id.*)
8. Although power is conferred upon the court, by statute, to require the husband to pay any sums necessary to enable the wife to carry on the suit, during its pendency, there is no law which authorizes a judicial tribunal to compel a husband to furnish his wife, before final decree, with a house, furniture, horses, or any other specific article, except money, in such sums as may be necessary to enable her to carry on the litigation, and for her suitable and comfortable subsistence. (*Id.*)

DONATIO MORTIS CAUSA.

1. A delivery as a free and voluntary gift of money by a soldier, at or about the time of his enlistment into the army, constituting a portion of his bounty bounty money, to a friend, with directions to keep the same as a gift, in case of his decease, does not constitute it a *donatio mortis causa*. (BARBOUR J. dissenting.) (*Dexheimer* agt. *Gautier*, ante 472.)

DOWER.

1. A testator having executed his bond to pay a debt, secured by his mortgage upon his real estate, which was also signed by the defendant, (his widow,) devised all his real and personal estate to his executors, with directions to sell the same, and *after paying his debts and incumbrances*, to invest a portion of the residue for the benefit of his widow, in lieu of dower: The widow having elected to take dower instead of the provision made for her in the will; *Held* that she took dower only in the equity of redemption, and was liable to contribution towards the payment of the mortgage debt. (*Leavenworth* agt. *Cooney*, 48 *Barb.* 570.)
2. It seems, however, that if the testator had not been personally liable to pay the mortgage debt, his direction that the same should be paid by his executors out of the proceeds of his real and personal property, would be strong, if not conclusive evidence of his intention to relieve the dower interest of his widow from the burden of contribution. (*Id.*)

DRAFT.

1. Where a draft, together with the proceeds thereof, comes lawfully into the possession of another, this bars the recovery for either, in an action for fraud in obtaining the draft, or tort for the conversion of the proceeds. (*Gray* agt. *Palmer*, 2 *Robt.*, 500.)

DURESS.

1. A note obtained from a prisoner, falsely charged with felony, is void in the hands of one who received it with knowledge that it was procured through an abuse of legal process, for purposes of oppression and exaction. (*Osborn* agt. *Robbins*, 36 N. Y. R., 365.)
2. The element of voluntary assent is wanting, where the instrumentalities employed to produce a consenting will are force and fraud. (*Id.*)
3. A contract is imputed to illegal duress, when it is exacted from one falsely imprisoned, in favor of the corrupt authors of the wrong; and they can derive no aid from the fact that the claim so secured was just in its origin. (*Id.*)
4. In such a case the illegal security is annulled, and the parties are remitted to their antecedent rights, (*Id.*)

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5. The defense that a note was obtained from the principal by unlawful duress, is available to the surety who united with him in its execution. (*Id.*)
6. Where the note was made by one under arrest on an accusation of ravishing the payee, it was error to exclude proof that the charge was false, and that the prisoner executed the note for the purpose of procuring his liberation from illegal restraint. (*Id.*)

EJECTMENT.

1. In an action of ejectment, the party claiming and defending the title of the tenant in possession, is properly a party defendant; and his declarations of title in himself, and his acts in defending the possession of his tenant, constitute him a tort-feasor with his tenant. (*Abel agt. Van Gelder*, 36 N.Y. R., 51.)
2. After a party puts forth his own title to the premises in controversy in support of the tenant's title, and invites the action against himself, it will be too late to object that he is an improper party to the action. (*Id.*)
3. The declaration of a person under whom plaintiff claims, made while in actual possession of premises, as to the extent of his claim or boundary, is admissible in evidence for the purpose of showing the extent of actual occupation by such person. (*Id.*)
4. Where, in an action of ejectment, it appears from the complaint that the relation of landlord and tenant exists between the defendants, and they omit to set up the misjoinder, in their answer, it is too late on the trial to successfully raise that question. It will be presumed, in such a case, that the landlord intended to waive that objection, and elected to remain a party defendant in the action. (*Ames agt. Harver*, 48 Barb., 56.)
5. The plaintiff claimed title under a deed from C. to him, purporting to convey the premises in question, and then proved by R. that he (R.) hired the premises of one S., who assumed to let the same as an agent of C. and that he had paid the rent to S. There was no evidence that either C. or the plaintiff ever occupied the premises, or that either of the defendants entered under C. or the plaintiff, or in any manner recognized their right to the premises: *Held* that the bare assertion of R. that S. assumed to rent the premises to him, as the agent of C. was inadmissible as against the defendants, and proved

nothing against them; and that the plaintiff had failed to establish a cause of action. (*Id.*)

6. The section of the Revised Statutes, providing that "if the right or title of a plaintiff in ejectment expires after the commencement of the suit, but before trial, the verdict shall be returned according to the fact; and judgment shall be entered that he recover his damages by reason of the withholding of the premises by the defendant, to be assessed; and that as to the premises claimed, the defendant go thereof without day," does not apply to an action of ejectment for the non-payment of rent, brought by the plaintiff as devisee of the lessor, against the defendant as devisee of the lessee, where the plaintiff, after the commencement of the action and before trial, conveys to third persons all his right and interest to and in the claims involved in the action, and in the premises in controversy. (*Van Rensselaer agt. Owen*, 48 Barb. 61.)
7. The plaintiff's title, in that section, has reference to the *estate* or interest in the premise, which for the time being is in the possession of, or represented by the plaintiff, and not merely to the person who is at the time the owner of the estate. It is the title upon which a plaintiff seeks to recover. (*Id.*)
8. If the *estate* expire, that is, cease or come to an end, the defendant should, as to the premises claimed, go thereof without day, and the plaintiff recover his damages for the unlawful withholding, up to the estate terminated; but if the estate continues to exist, though in other hands, the defendant should be permanently discharged from liability therefor; while the plaintiff, if he recovers them, recovers them as trustee in fact of him who since the commencement of the action has become the real party in interest. (*Id.*)
9. An assignee, who takes an assignment of a contract of purchase, to secure a debt due to him from an assignor, cannot, on default of payment, maintain an action of ejectment against his assignor to recover the possession of the lands. (*Campbell agt. Swan*, 48 Barb. 109.)

ELECTION.

1. Where the plaintiff, having an election to charge one of two parties with a debt, in the alternative, charges one of them by commencing an action and recovering a judgment against him, the other is discharged. Having made his

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election, the plaintiff must abide by it. (*Gray agt. Palmer*, 2 Robt. 500.)

ENLISTED MINORS.

1. The acts of congress of February, 1862, and of February and July, 1864, conferring upon the secretary of war the authority to discharge enlisted minors, upon certain terms and conditions, are to be construed as having provided a mode by which persons improperly enlisted can be discharged, and as having forbidden other modes of obtaining their discharges. (*LEONARD, J., dissented.*) (*Matter of O'Connor*, 48 Barb. 258.)
2. The federal government has by those acts assumed such jurisdiction, in cases of this kind, as to make it necessarily exclusive. (*Per CLERKE, J.*) (*Id.*)

EQUITY.

1. The defendant agreed to sell and convey to W. & C. a lot of land, twenty-six feet six inches in width, being in depth on C. street one hundred and twenty feet "to and including the stable on the rear of the premises." The defendant executed and delivered a deed for the lot, describing it as one hundred and twenty feet in depth, but making no mention of the stable. There was a stable on the rear of the premises, built by a former owner, situated partly upon the said lot, but eleven feet and ten inches thereof were located on the rear of another lot belonging to the defendant. Both parties acted in the erroneous belief that the one hundred and twenty feet so conveyed included the stable, and neither knew that any portion of it was located upon another lot. *Held*, that this was not a case for the equitable interposition of the court to reform the deed, so as to make it conform, as to the dimensions of the premises, to the previous agreement between the parties. (*INGRAHAM, J., dissented.*) (*White agt. Williams*, 48 Barb. 222.)
2. A court of equity never grants that relief, except when the mistake is very plain and operates contrary to the intention of the parties. (*Per CLERKE, J.*) (*Id.*)
3. A claim made for relief, or for a deed, upon terms to which a party is not entitled, does not subject him compulsorily to accept a deed upon some other terms. (*Hicksville, &c. Railroad Co. agt. The Long Island Railroad Co.* 48 Barb. 355.)
4. In such a case, the relief demanded

should be denied, simply with or without costs, according to the regulated discretion in equity cases. (*Id.*)

ERRATA.

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ESTOPPEL.

1. A promise by the defendant, that if the plaintiff would suspend bringing an action upon the second note of the defendant, he would abide by the decision of the first action upon a similar note of the defendant, if it amounted to a promise to pay, was not sufficient to take the note out of the operation of the statute of limitations—not being in writing. (*Brookman agt. Metcalf, ante*, 429.)
2. Where the plaintiff, upon the faith of such promise by the defendant, delayed bringing an action upon the second note, until after the decision of the action upon the first note, and until after the statute of limitations had attached: *Held*, that the defendant, upon the doctrine of *equitable estoppel*, or *estoppel in pais*, was precluded from setting up the statute of limitations as a defense. (*Id.*)
3. The indorsement by a bank upon a note or check payable at its counter, "good," is information that the maker or drawer has funds to meet it; and having the means of accurate knowledge, it is bound to state the facts correctly, etc. (*Irving Bank agt. Wetherald*, 36 N. Y. R. 335.)

EVIDENCE.

1. If the facts proven on the trial establish a cause of action, the court may allow the *complaint to be amended*. (*Code, § 173.*) In the like case, the court may *conform the pleadings to the facts proved*. (*Meyer agt. Fiegel, ante*, 434.)
2. The power to amend a pleading, or to conform it to the facts, is *discretionary*; but it may be exercised in the cases and under the limitations contained in said section (173). If, therefore, on the trial, the defect in the complaint is supplied by proof, the objection may be overruled. (*Id.*)
3. Where, on the trial, evidence is offered, before a motion is made to dismiss the complaint, which may overcome the objections to the complaint, rendering it proper in the discretion of the court to

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- allow an amendment or to conform the pleadings to the facts, it is error to reject such evidence. (*Id.*)
4. An account or memorandum of sales of property, entered by a vendor in a book, will not affect the rights of other parties, and is not admissible in evidence against them. (*Purchase agt. Mattison*, 2 Robt. 71.)
5. The meaning of a mark, affixed to an entry in a book, cannot be explained by a person who did not make it. (*Id.*)
6. Under an order authorizing the reading of a party's testimony as taken on a former trial, the testimony cannot be read from a printed case, without proof that the paper read from contains a correct and true minute of the evidence. (*Oakley agt. Sears*, 2 Robt. 440.)
7. Everything which happened in the presence and hearing of the prisoner, at the time of the homicide, as tending to show the motive with which it was committed, is material. (*McKee agt. People*, 36 N. Y. R. 113.)
8. The act of 1855, chapter 337, as amended in 1858, chapter 330, has no application to trials of courts of oyer and terminer. (*Id.*)
9. Such provisions only apply to the general sessions of the peace in and for the city and county of New York. (*Id.*)
10. The remarks of the judge on the subject of feigning insanity by the prisoner were correct. (*Id.*)
11. When the testimony offered can in no event become material to the questions at issue, its rejection is proper, irrespective of the grounds upon which it was rejected. (*People agt. Brandreth*, 36 N. Y. R. 191.)
12. It is important to state the true grounds of an objection only in cases where it is possible to obviate the difficulty on trial. (*Id.*)
13. Declarations made by the grantor of premises, after he has sold the same, even though he continue in the occupation of the same up to the time of making such declarations, are not competent evidence as affecting the rights of his grantee. (*Vrooman agt. King*, 36 N. Y. R. 477.)
14. Where the defendant, in an action of ejectment, claimed that the plaintiffs purchased the premises at the defendant's request, under a verbal agreement that the latter should occupy and have the premises as his own, in consideration that he would support their mother during her life, which he alleged he had performed, but which agreement as well as performance was denied by the plaintiffs: *Held*, that letters written by the vendor to the plaintiffs, at the instigation of the defendant, or with his knowledge, containing propositions in relation to the sale, inconsistent with such an agreement, were admissible in evidence as part of the *res gestae*. (*Moore agt. Hamilton*, 48 Barb. 120.)
15. An objection that the cause was irregularly put upon the calendar, by the plaintiff's counsel, and urged to trial, should be brought before the special term, on motion to set aside the verdict, and cannot be alleged as error after a trial has been had. It is not a ground of error, affecting the judgment, upon an appeal therefrom. (*Macklem agt. Marsh*, 48 Barb. 267.)
16. Where, in an action upon a promissory note, against the indorser, a witness testified that he procured the indorsement of the defendant at the request of the maker, and that the indorser had no interest in the note, or in its proceeds: *Held*, that a certificate, given by the witness to the plaintiffs, before the discontinuing of the note, stating that the note was business paper, was admissible in evidence for the purpose of affecting the credibility of the witness, by showing that he had made a statement at variance with the testimony given at the trial, under circumstances tending to defraud the plaintiffs, if the certificate was untrue. (*Id.*)
17. Where a judge was requested to charge the jury that entries made by witnesses, in the books of a bank, of what they swore they did, at the time, were evidence of the facts, and entitled to the same credit as their evidence, although the witnesses making the entries did not recollect them; and that such entries were more reliable than the recollection of the plaintiff, after a lapse of nearly six years: *Held*, that such request was properly refused, and that it was correctly left for the jury to say, upon all the evidence, which was entitled to the greater weight. (*Hutchinson agt. Market Bank of Troy*, 48 Barb. 302.)
18. Parol evidence of prior oral negotiations, tending to establish the fact that an erroneous amount was inserted in a bill of sale and in a release, is admissible for the purpose of proving that the consideration for a sale of property was wrongly stated in the bill of sale and release at \$4,650, instead of \$4,250. And this, although the plaintiff has not, in his complaint, formally asked for a

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reformation of the contract. (*Rosboro agt. Peck*, 48 Barb. 92.)

19. The pleadings can be amended, in such a case, so as to render the testimony entirely admissible. The court is authorized to amend the complaint to conform it to the proof, and all the facts having been elicited, they will be regarded as if the amendment had actually been made. (*Id.*)

20. Parol evidence is not admissible to vary, enlarge or contradict a written stipulation made by an indorser of a promissory note, waiving "notice of protest." (*Buckley agt. Bentley*, 48 Barb. 283.)

21. The rule excluding parol evidence to enlarge or contradict a writing, is not limited to contracts made upon a consideration passing between the parties, but is equally applicable to all cases where the writing was designed to be the repository and evidence of the final conclusions of the parties. (MASON, J., dissented.) (*Id.*)

EXECUTION.

1. Where a judgment of a justice of the peace for \$25 or over, exclusive of costs, is docketed with the clerk of the court of common pleas of the city and county of New York, the execution thereon should be issued by the party or his attorney, not by the county clerk. (*Brush agt. Lee, ante*, 283.)

2. There is no rule of law or of public policy precluding an attorney from entering into an agreement with one not an attorney, to enter his office and act as his clerk, compensating him therefor by giving him an interest in the business. Such clerk can properly issue an execution upon a judgment in the name of the attorney. (*Id.*)

3. In an action against a sheriff, for taking and converting the property of the plaintiff, it is not necessary to aver in complaint that the property taken was exempt from execution. (*Dennis agt. Snell, ante*, 467.)

4. The proof of such fact on the trial can only become necessary to meet a defense, and can then be given in evidence without being pleaded. (*Id.*)

5. Where, however, the complaint contains an averment that the property is exempt from execution, the defendant is not compelled to set up in his answer the non-exemption of the property, or be excluded from proving it on the trial, merely because it is averred in the com-

plaint. It is an immaterial allegation, which it is not necessary to deny. (*Id.*)

6. If the sheriff relies entirely upon the execution in taking property, it is sufficient for him merely to set forth the writ; but if he desires to go beyond the execution, and inquire into the consideration of the judgment upon which the execution is issued, he must plead the judgment, and set it forth in his answer. (*Id.*)

7. An execution issued by the plaintiff upon an original judgment at special term in his favor, after an oral announcement by the judges of the same court, at a general term, of an affirmance of such judgment on an appeal, and the entry by the clerk of such affirmance in the minutes of such general term, is a mere irregularity, and only to be taken advantage of on motion. (*Bowman agt. Tallman*, 2 Robt. 622.)

8. The right to move to set aside such execution on the original judgment for irregularity may be waived by delay in moving; and the lapse of five months is such delay, when no excuse is given therefor. (*Id.*)

9. On judgments in a district court of the city of New York, docketed with the clerk of the common pleas, may be enforced in the same manner as judgments rendered in the court of common pleas. (*Brush agt. Lee*, 36 N. Y. R. 49.)

10. In such cases, attorney may issue the execution. (*Id.*)

11. May be issued to another county, notwithstanding the debtor has property subject to levy in the county where the judgment was rendered. (*Id.*)

EXECUTORS AND ADMINISTRATORS.

1. Although an administrator with the will annexed of a testator domiciled in another state at the time of his death, cannot by virtue of his letters of administration granted in that state maintain an action in this state, upon any claim due to the estate of such testator, yet an assignee thereof from such administrator, for a valuable consideration, may do so. (*Peterson agt. The Chemical Bank*, 2 Robt. 605.)

2. Such letters of administration, although not recognizable as giving the administrator a right to sue in his own name in the courts of this state, are sufficient to transfer a valid title to any part of

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the estate to a third party so as to enable him to sue in his own name as assignee. (*Id.*)

3. Administrators, representing the creditors of the intestate, who was insolvent at the time of his death, may disaffirm, treat as void and resist a transfer by him alleged to be fraudulent as against creditors. It also makes no difference whether they become actors in a proceeding to treat as void such transfer, and to recover the property transferred, or, having obtained possession of it, resist any attempt by the fraudulent vendee to recover either its possession or its value. In either case, the right of the persons representing the creditors is the same; and they may defeat a recovery, if they can establish, satisfactorily, the fraudulency of the transaction. (*Bryant agt. Bryant*, 2 *Robt.* 612.)
4. An action being brought against administrators, as individuals, does not prevent their claiming to have acted in their representative characters. (*Id.*)

5. The plaintiff brought suits against A. and P., as administrators of N. A. deceased, for services rendered to N. A., and recovered judgments. He then applied to the surrogate, for an order that A. and P. pay such judgments out of the estate of the intestate, and an order was made by the surrogate, directing the payment by A. and P. within five days. Payment was not made, and the decree being docketed in the common pleas, an execution was issued from that court, against the administrators. This not being paid, the surrogate, on application made to him, assigned to the plaintiff the official bond given by the administrators. In an action upon such bond, against the sureties: Held that the proceedings of the plaintiff were regular; and that the action was well brought. (*Thayer agt. Clark*, 48 *Barb.* 243.)

6. Held, also, that the decree of the surrogate was conclusive upon the administrators. That if they had any defense it should have been made in that proceeding. (*Id.*)

7. That the surrogate's decree established the indebtedness of the estate to the plaintiff; and when that was established by the decree of a competent tribunal the administrators were bound to pay it. And that on their neglecting to do so, the bond which they gave as administrators, with sureties, was forfeited. (*Id.*)

8. The sureties in such a bond have no

right to go back of the decree of the surrogate directing the payment of a debt, by the administrators, and show that such decree was erroneous. It is conclusive as to the indebtedness of the estate, and as to the obligation of the administrators to pay it. (*Id.*)

9. The act of 1837, authorizing the assignment of an administrator's bond, to a creditor, by the surrogate, where an execution issued upon his decree should have been returned unsatisfied, and the prosecution of such bond by the creditor, (*Laws of 1837*; ch. 460,) applies to any decree made by the surrogate for the payment of money, by an administrator, and not merely to a decree for a general accounting by him. (*Id.*)
10. Payments on demand barred by statute at the death of testator, etc., do not revive the cause of action. (*McLaren agt. McMartin*, 36 *N. Y. R.* 88.)
11. Goods taken and continuing in specie in the hands of the wrong-doer, may be recovered back by the executor or personal representative of the owner; and if they have been disposed of, an action for money had and received, will lie to recover their value. (*Potter agt. Van Vranken*, 36 *N. Y. R.* 619.)

EXPRESS COMPANIES.

1. A receipt given by an express company for goods delivered to it for carriage, does not require a *United States revenue stamp* to be affixed to it. (*Belyer agt. Dinsmore*, ante, 421.)
2. An express company is to be regarded as a *common carrier*, and their responsibility for the safe delivery of property intrusted to them is the same as other common carriers. But they may limit their liability by express contract. (*Id.*)
3. A common carrier receives a consideration for the carriage of property, and he is bound to carry it accordingly; he cannot by a mere notice, relieve himself from that liability. Even proof of such notice being brought to the knowledge of the owner, would not be sufficient to relieve the carrier of liability; but an express contract must be proven. (*Id.*)
4. The mere acceptance of a receipt of the carrier by the owner or shipper, limiting the liability of the carrier, is not proof of an express contract between the parties settling and limiting such liability. (*Id.*)

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FALSE IMPRISONMENT.

1. For the purposes of an action of false imprisonment, an abandonment of the charge and discontinuance of the prosecution is equivalent to a discharge of the accusation. (*Fay agt. O'Neill*, 36 N. Y. R. 11.)

FALSE REPRESENTATIONS.

1. In an action for falsely and fraudulently inducing the plaintiffs to sell goods to a third person, on credit, the defendant's liability depends upon the falsity of his statements, with his knowledge thereof, and their effect upon the business dealings between the plaintiffs and such third person. These being questions of fact proper for the consideration of the jury, unless there has been too great a lapse of time between the making of the representations and the giving of the credit, it is error to take those questions from the consideration of the jury, and dismiss the complaint, upon the trial. (*Von Bruck agt. Peyster*, 2 Robt. 468.)
2. Although there must be by law some limit to the period of time during which it is fair to presume and allow a party to claim, that the influence of the false representations continued to operate, like all questions of a similar nature, of mixed law and fact, the length of such time must depend upon the facts and circumstances of each case. In all such cases, it is for the jury, and not the court, to determine whether the plaintiff continued to be operated upon by the representations; and it would be proper to instruct the jury that they are to ascertain from the evidence and determine such fact. (*ROBERTSON, Ch. J. dissented.* (*Id.*)
3. *Held*, in this case, that the question whether the plaintiffs were influenced in making sales to a third person, in 1860, by representations made by the defendant two years and four months previously, as to his responsibility, should have gone to the jury; it appearing that the defendant, after the making of the original representations, had, in July, 1860, again intervened, acting as the agent of such third person, but personally promising the punctual payment by the latter of a new indebtedness, then incurred at the end of a proposed credit. (*Id.*)
4. In March, 1858, the defendant, by letter addressed to the plaintiffs, announced a transfer by the former of his business, with debts and credits, to a third person, who would "continue the same with undiminished means," under the firm of E. K., successor to the defendant. The letter requested the plaintiffs to "extend the same confidence to his (the defendant's) successor they had hitherto reposed in him." The defendant subsequently stated to one of the plaintiffs that he, being a man of property, had given up his business to such third person; that "in fact the concern would remain altogether the same, with an alteration in the firm." At the time of making these representations, such third person was indebted to the defendant for the whole purchase money of his stock of goods, and \$2,000 for borrowed money, and had no other means than such goods and borrowed money. He subsequently gave the defendant a chattel mortgage on all his stock in trade, to secure the payment of \$28,000. The representations made by the defendant induced the plaintiffs to sell goods to such third person on credit, the price of which they were unable to collect of him. *Held*, that the defendant was liable to the plaintiffs for the loss they had suffered in consequence of the making of the representations in question. (*Id.*)
5. Where the agent of the defendants, in procuring goods for them in their names, of the plaintiff, in order to induce him to sell to them, made the same representations of their responsibility and business as had been made by the defendants to him, in reference to his purchases for them: *Held*, that this fact warranted the inference that the agent was authorized by the defendants to make such statements to the plaintiff or any one else from whom he purchased for them, in order to enable him to make such purchases. (*Smith agt. Frank*, 2 Robt. 626.)
6. The contract being made on the 9th of November, and the plaintiff having sent, four days afterwards, the measurer's return of the merchandise agreed to be sold, and a bill for the merchandise to a large amount (\$11,000), to the defendants, and on the next day (15th) demanded payment, and the defendants having promised to pay the bill the next week, but between that day and two days afterwards (the 17th), failed in business: *Held*, that this was sufficient *prima facie* evidence of the falsity of a representation of solvency made at the time of the purchase. (*Id.*)
7. *Held*, also, that if any alteration in the defendants' affairs, for the worse, had taken place before the delivery of the measurer's return, they were bound in honesty to have notified the plaintiff of it; and that, not having done so,

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they were to be looked upon as ratifying their former representations; also, that their attempt to postpone the payment for a week, and failing within two days, was conclusive of intent to defraud, in the absence of any explanation. (*Id.*)

8. A complaint alleged that the defendant obtained from the plaintiff her indorsement upon a treasury draft, by certain false and fraudulent statements, to wit: that he *would* not take the proceeds of the draft to California, but that, after paying certain claims, he *would* immediately return the remainder of the proceeds to the plaintiff, and *would* advise her how to invest the same, &c. Held, that such statements being merely promises for future conduct, and not representations of *existing facts*, were not of such a character as to make the defendant responsible, in an action for fraud in procuring the plaintiff's indorsement upon the draft. (*Gray agt. Palmer*, 2 *Iobt.* 500.)
9. To be actionable, representations must be of some fact alleged to exist at the time, and be made for the purpose of inducing the other party to do or part with something. (*Id.*)
10. In an action of that nature, the plaintiff is confined to proof of the facts alleged in the complaint. (*Id.*)

FERRY COMPANY.

1. Negligence in letting down chain before the boat is securely fastened to bridge, etc. (*Ferris agt. Union Ferry Co.* 36 *N. Y. R.* 312.)

FORECLOSURE OF MORTGAGES.

1. In actions to foreclose, etc., a reference to ascertain the amount due is proper. (*Chamberlain agt. Dempsey*, 36 *N. Y. R.* 141.)

FOREIGN CORPORATIONS.

1. In an action in this state by a billholder of a foreign banking corporation against a stockholder, in which it is sought to charge such stockholder upon a personal liability under the foreign statute, a complaint which merely alleges that "*under and by virtue of a law or laws*" of such foreign state, the defendant, as such stockholder, "*is liable to the creditors*" of the corporation, does not state a liability which can be enforced by an action in this state. (*Patterson agt. Baker*, *ante*, 180.)

2. If any personal liabilities of a stockholder of a foreign corporation, for the corporate debts, can be enforced in this state, it is such only as are primary and original liabilities of the stockholders as co-partners; and the foreign law must be so averred, that it shall appear with certainty by the complaint itself that, as regards the debt sued on, the stockholders are in fact co-partners, notwithstanding the charter, and that the liability under the statute is of this nature, and not a liability in the nature of a penalty, or a liability imposed after the contracting of the debt. (*Ex parte Van Riper*, 20 *Wend.* 214, *doubled.*) (*Id.*)

3. A creditor of a foreign corporation cannot maintain an action in this state against a director of the corporation, for willful and fraudulent mismanagement of its affairs, whereby the property of the corporation was wholly wasted, lost or embezzled, and the corporation rendered wholly insolvent, and the plaintiffs' claims against the corporation rendered wholly worthless. (*Affirming Gardner agt. Pollard*, 10 *Bors.* 674; *Smith agt. Poor*, 40 *Maine*, 415; *Smith agt. Hurd*, 12 *Met.* 371; *Allen agt. Curtis*, 26 *Conn.* 460.) (*Winter agt. Baker*, *ante*, 183.)

4. An action will not lie in this state by an individual billholder against an individual stockholder, to enforce the personal liability of a stockholder of a foreign banking corporation, by whose charter it is provided that the persons and property of the stockholders in said bank should be pledged and bound in proportion to the amount of the shares that each individual might hold in said bank, for the ultimate redemption of the bills or notes issued by or from said bank, during the time he may hold such stock, as in commercial cases, or simple cases of debt. (*Scott agt. Roberts*, *ante*, 185.)

FRAUD.

1. A secret arrangement by a debtor with one of his creditors, to induce him to sign a composition deed with other creditors, by which he gave to such creditor his note for the balance of the debt over and above the per cent named in the composition deed, is fraudulent; and the note so given is void in the hands of the party thereto. (*Lawrence agt. Clark*, 36 *N. Y. R.* 128.)
2. A note obtained from a prisoner, falsely charged with felony, is void in the hands of one who received it with the knowledge that it was procured through

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an abuse of legal process, for purposes of oppression or exaction. (*Osborn agt. Robbins*, 36 N. Y. R. 365.)

3. The element of voluntary assent is wanting, where the instrumentalities employed to produce a consenting will are force and fraud. (*Id.*)
4. An agent, under a general authority to purchase, cannot buy from himself, without the knowledge or assent of his principal. (*Conkey agt. Bond*, 36 N. Y. R. 427.)
4. Such a transaction is a breach of duty, and the contract is subject to rescission irrespective of any question of intentional fraud or actual injury. (*Id.*)

FRAUDULENT REPRESENTATIONS.

1. Where goods are purchased upon credit, through false representations of the vendee as to his pecuniary condition, the vendor may disaffirm the contract of sale and sue for the fraud. But he must offer to return the notes or securities taken from the vendee, as a consideration for the purchase. In such case the property is not changed, and no title passes to the vendee. (*Scott agt. Simmons, ante*, 66.)
2. In an action for wrongful conversion of personal property, a warrant of attachment may issue. (*Id.*)
2. Where an attachment is sought upon the ground that the defendant has assigned or disposed of, or is about to assign or dispose of his property, with intent to defraud his creditors (*Code*, § 227), the facts should be such at least as to justify a deduction from them of such fraudulent intent. (*Id.*)
1. Where a person, under an agreement to purchase two lots of land, subject to the payment of a certain mortgage thereon, and to build a building on each lot, at a certain time and under certain conditions, upon the performance of which he is to receive a deed in fee of the premises; and after the buildings are partially built, he, by fraud and misrepresentation, induces the mortgagor to release one of the lots, without any consideration therefor; a court of equity will restore the mortgagor, as far as possible, to his former condition as to the security, by decreeing that the purchaser pay in money to the mortgagor one-half the amount of the mortgage, although the purchaser alleges that the remaining lot and building are ample security for the whole mortgage money. (*Stebbins agt. Howell, ante*, 83.)

FRAUDULENT SUPPRESSION.

1. One who induces another to give credit to a third party, by a fraudulent suppression or concealment of the latter's embarrassments and indebtedness, at the time when he is bound to disclose them, is liable to the creditor, in an action for damages for the loss thus occasioned. (*Von Bruck agt. Peyster*, 2 Robt. 468.)

GIFTS.

1. If the evidence be such as to show that an intended gift of promissory notes made to secure the payment of the consideration of a conveyance of real estate, did not take effect, or was revoked, the remedy of the donor's administrator is by a bill in equity, to recover the consideration of the notes from the makers, or to avoid the sale out of which they arose, and to get back the property sold. (*Fenton agt. Fenton*, 48 Barb. 581.)
2. By the common law, personal property may pass by gift or grant, with or without deed; but a parol gift, without some act of delivery, will not affect the property, whether by act *inter vivos* or *mortis causa*. But where a gift *inter vivos* is perfected by delivery of possession of the thing, or delivery of a deed of gift, it is complete, although made without any consideration. (*Id.*)
3. An agreement between F. and his two daughters, the defendants, made on the 15th of November, 1851, contemporaneously with the sale to them of his farm and personal property, recited the consideration of such sale, which consisted in part of their five several promissory notes, each for the sum of \$500, payable to the three sons and two daughters of F. at the decease of his wife. The agreement referred to those notes as being the portion that F. wished the payee to receive out of his property after the decease of himself and his wife. In December, 1857, these notes were canceled, and F. caused the makers to execute new notes in renewal, and signed a paper declaring that he intended the new notes should be considered by his children "in full of their shares in his property which he had or ever had had." Held that this transaction was not fraudulent as to creditors; that no trust was created for the use of the grantor; and that it was a fair and just distribution of his estate among his children. (*Id.*)
4. Held, also, that it transferred the legal

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- title to the debts represented in the notes; and, with the accompanying declaration contained in the agreement, and the paper of December, 1857, furnished satisfactory evidence that there was a delivery of the notes to the payees, and that the possession of them afterwards by F. was as trustee for them. (*Id.*)
5. Held, further, that the fact that the notes were left by the donor in a position where the beneficiaries might take them after his death was convincing proof that he did not change his mind; and no further formality, to complete the gift, was necessary. (*Id.*)
6. It is only when something remains to be done, by or on behalf of the donor, which is not done before his death, that a gift fails to take effect. (*Id.*)
7. An actual transmutation of possession is not essential, when the settler intends to convert himself into a trustee, and makes a sufficient declaration to that effect. (*Id.*)
8. Choses in action, as notes not indorsed, money and certificates, may be well transferred by delivery only, as a gift "causa mortis." (*Westerlo agt. De Witt, 36 N. Y. R. 340.*)
9. In the present case it was held that the finding of the referee upon the evidence detailed that there had been an actual delivery of a certificate of deposit, as a gift in apprehension of death, was satisfactory and should have been sustained. (*Id.*)
10. The donee and the defendant being in mutual error as to the ownership of the certificate, and the defendant under such error having received the amount of the same from the trust company; held that he was bound to refund the amount thereof to the plaintiff. (*Id.*)
11. Gifts and voluntary conveyances made by the husband to the wife without fraudulent intent, at a time when he is indebted to no one, are not to be called in question by his subsequent creditors. (*Phillips agt. Wooster, 36 N. Y. R. 412.*)
12. A subsequent indebtedness cannot be invoked to make that fraudulent which was honest and free from impeachment at the time. (*Id.*)
13. The grantor of premises to a married woman, on receiving the price therefor from her husband, cannot complain that the conveyance was in fraud of himself, as a creditor of the husband: for he not only consented to, but performed the act himself. (*Id.*)

GRANT.

1. A condition, in a grant of land by the corporation of the city of New York, that the grant shall be void in case it shall at any time afterwards appear that the grantee was not seized of an estate in fee simple absolute to the eastward of the lands so granted, is a condition subsequent, and does not defeat the estate, unless proceedings are taken by the corporation for that purpose. (*Towle agt. Smith, 2 Robt. 489.*)
2. Such a grant is subject to the condition contained in a grant of the same lands, from the state to the corporation of the city, that in every grant by the latter, the owner of the adjacent upland shall have a preference. (*Id.*)
3. There is a marked distinction in the object of statutes which avoid a particular provision in an instrument, and that of those which avoid a whole instrument on account of the illegality of the purpose of a part. In the former case, such provision is made void as a matter of policy as to it alone; in the latter, the whole instrument is looked upon as an engine of fraud or other violation of the statute, in which the valid and invalid parts are inseparable. (*Id.*)
4. The statute making void grants of land held adversely, at the time, by another, does not make the whole void. Only that part which violates the law becomes inoperative. (*Id.*)
5. The statute which makes the acceptance of a grant of lands held adversely a misdemeanor, does not invalidate a grant of other lands, in the same conveyance. (*Id.*)
6. The amendment of section 111 of the Code of Procedure, passed in 1862, allowing the grantees of lands held adversely to bring an action in the name of his grantor, against the party in possession, repeals, by implication, the statute making the taking of a grant of land held adversely, a misdemeanor; it seems. (*Id.*)

HABEAS CORPUS.

1. On *habeas corpus*, the judge before whom it is returnable will not review the decision of the judge of another court made upon full argument, that the warrant upon which the defendant was arrested was properly issued and the defendant was legally held, where the same objections to the warrant and the arrest are relied on upon the *habeas corpus*. The remedy of the defendant

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- in such case is by certiorari. (*Matter of James K. Place*, ante, 259.)
2. A city judge of the city of New York has no authority to issue writs of *habeas corpus*, he having no jurisdiction in *habeas corpus* proceedings. (*Nash agt. The People*, 36 N. Y. R. 607.)

HIGHWAYS.

1. On certiorari to review the decision of referees in laying out a highway, the authority of the supreme court is confined to an *affirmance or reversal* of their proceedings and decision. (*People agt. Ferris*, ante, 189.)
2. Where the supreme court on such review made an order vacating the decision of the referees, and that the "order appointing them to be set aside, the appeal to stand, to be determined by a new board of referees, to be appointed by the county judge:" *Held*, that the court exceeded its authority. The latter part of the order granted was void. (*Id.*)
3. Where town lots are sold and described only by numbers on the recorded map, by which they appear to be bounded on a public street or highway, such lots are to be bounded by the center of such street. (*Perrin agt. N. Y. Central R. R. Co.*, 36 N. Y. R. 120.)
4. Where the open space on the map, by which only such lots can be approached, is designated as "ParE," it is, nevertheless, to be deemed as a designed means of access to such lots; and they are to be bounded by the center of such space. (*Id.*)
5. These questions of boundary are to be determined by the palpable intention of the parties, as it appears from all the circumstances. (*Hunt, J., dissenting.*) (*Id.*)

HIGHWAY COMMISSIONERS.

1. The common law rule in relation to the execution of a joint authority is inapplicable, when the power conferred is conditional and the statute prescribes the mode in which it is to be exercised. (*People agt. Williams*, 36 N. Y. R. 441.)
2. Orders made by commissioners of highways should not be upheld, where they fail to show substantial compliance with the form of procedure prescribed, as a safeguard against unadvised and improvident action. (*Id.*)
3. When it appears that an order was

made by two of the three commissioners, and it does not appear that the third commissioner participated in their deliberations or was notified so to do, the order is void on its face. (*Id.*)

HUSBAND AND WIFE.

1. In an action brought by the plaintiff to quiet his title to land conveyed to him by the defendant's husband in trust to pay debts, wherein besides seeking the relief granted by the statutory provision for enforcing the determination of claims to land, (2 R. S. 313, § 3,) the complaint demanded as relief that such title might be "adjudged free and clear from any right claimed by the defendant," and she set up as a defense a prior right under a deed with full covenants, of the same premises, executed directly to her by her husband, (before the conveyance thereof to the plaintiff, under which the latter claims,) pursuant to a prior agreement between herself and her husband for a valuable as a good consideration, with intent to vest in the defendant the fee simple absolute of such land and settle the same upon her as a provision for her, and as her separate estate, it being suited to the means and liabilities of the husband at the time. On demurrer to an answer containing such defense: *Held*, 1. An action under such a provision is subject to the same rules as any other action, by the Code of Procedure. The same defenses may be set up therein, and equitable relief may be demanded by way of counter claim in the answer. 2. The voidness at law of a deed directly from a husband to a wife does not interfere with the equitable rights of the latter under it. 3. The statute of 1849, which excludes a gift from a husband to a wife from the cases in which it bestows on the latter the powers of a feme sole, does not interfere with the exercise of an equitable jurisdiction to protect the wife in such a case as a ward in chancery or *cestui que trust* of the husband. 4. The equity of the wife in such case, if enforceable only as a trust, is not included in the prohibition by the Revised Statutes of any uses and trusts in land but those therein enumerated, as it is created by implication of law; which kind of trusts are expressly excepted from such prohibition. 5. That as the demurrer admitted such a settlement to have been suited to the means of the husband; made for a valuable as well as a good consideration and in pursuance of a previous agreement, equity would sustain it against even the creditors of the husband. 6. That the ac-

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complishment of all the purposes of a trust, which destroyed all the interest of the trustee thereof of the land held by him, might be set up as a defense to any action brought by him to litigate the claims of others to such land. (*Peck agt. Brown*, 2 Robt. 119.)

2. A married woman, carrying on a separate business, is liable for contracts made therein; and in an action on such a contract, an averment that in making it she represented herself as making it for the uses of such business, is sufficient. (*Coster agt. Isaacs*, 2 Robt. 601.)

3. Where, on an application to the surrogate for letters of administration, it appeared that an alleged marriage was celebrated by the husband under an assumed name; was not consummated for five years thereafter, when the parties first cohabited together; and the husband had always lived apart from the wife until his death; and had not acknowledged the marriage, to his family: *Held* that upon these facts, in connection with newly discovered evidence that the husband was absent from the city at the time of the alleged marriage, justice to all parties required that the question of fact as to a marriage having taken place should be submitted to a jury. (*Angerine agt. Angerine*, 48 Barb. 417.)

INCORPORATED COMPANIES.

1. The officers of the company issuing false certificates are liable therefor to the assignees of said certificates, when they have been purchased and held in good faith. (*Bruff agt. Mali*, 36 N. Y. R. 200.)

INCONSISTENT DEFENSES.

I. Whether, as the Code of Procedure allows a defendant to set forth as many defenses as he may have, there is any express provision of law authorizing the court to strike out defenses merely because they are inconsistent? *Quere*. (*Per MONELL, J.*) (*Bryant agt. Bryant*, 2 Robt. 612.)

INJUNCTION.

1. Where the defendant, for a valuable consideration, sold to the plaintiff all his stock in trade, fixtures, boxes, horses, wagons, &c., and all the right, interest, privileges and advantages acquired and possessed by him for the prosecution and continuance of the business of pedling and selling a certain

kind of tobacco, &c., upon a certain described route, embracing the cities of Albany and Schenectady, and villages of Greenbush, &c.; and covenanted and agreed that he would not in any manner interfere with, hinder or obstruct the plaintiff in the prosecution of his said pedling business in the district, or over the route, at or about the places mentioned, and that he would not do or say anything to his old customers to discourage or hinder the plaintiff in the said business:

2. *Held*, that it was a violation of this agreement, for which an injunction would lie, where the defendant started the same business of pedling and selling tobacco, &c., in the same district and vicinity, although he acted as agent, and sold other tobacco besides that which the plaintiff sold. Neither as principal or agent, had the defendant a right to interfere with or to obstruct the plaintiff in the prosecution of the business he had transferred to him. (*Ewing agt. Johnson*, ante, 202.)

3. Such agreement is not void as being in restraint of trade, as the restraint is not unreasonable, applied to such a district or territory. (*Id.*)

4. Where there is a conflict of evidence upon the fact whether the original injunction order was shown to the defendant at the time of the service of a copy of it, and there being a probability that the defendant was mistaken as to that fact, and he having full notice of all the proceedings, the service will be held sufficient. (*Id.*)

5. Where, in an action brought by the people of the state of New York against a foreign railroad corporation, it appeared from the pleadings that the defendants had taken possession of a tract of land under water, in the bay of New York, and the Hudson river, displaced the water by filling in the same to the extent of eight hundred acres, in a portion of the bay and river over which the state of New York has exclusive jurisdiction, and were engaged in filling in to a larger extent, and would cause serious damage to the harbor of New York; and that they were so doing without any right, and without any grant or permission from the plaintiff; and by their admissions the defendants appeared as simple wrong-doers and trespassers, committing a serious injury to the rights of property of the plaintiffs: *Held* that it was a proper case for restraining them, by injunction, from doing further wrong and damage, until it should appear that they had some right and authority for

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their proceedings. (*The People agt. The Central Railroad of New Jersey*, 48 Barb. 478.)

INFANTS.

1. The power of the Supreme Court to authorize a sale of the real property of infants, by a special proceeding, is wholly a creation of the statute, and is not inherent in it as a court. Hence the statute must be strictly followed, and its terms fully complied with. (*O'Reilly agt. King*, 2 Robt. 587.)
2. A petition for the sale of real estate of infants was entitled "The petition of, &c. infants by their next friend." Held that this was the application of the infants, by their next friend, as required by the statute; and that the Supreme Court having determined that it was sufficient in substance, a mere departure from some prescribed form or rule of court would not affect the jurisdiction of the court, over the application. (*Id.*)
3. Such an application may be made by an uncle of the infants, being their only male relative, as their next friend: and the fact that he is a creditor of the infants does not constitute an adverse interest which will disqualify him. (*Id.*)
4. A special guardian appointed to sell the real estate of infants, when authorized by the court, may properly unite with other tenants in common of the property, in making a conveyance. (*Id.*)

INSOLVENTS.

1. When a judgment creditor is not one of the petitioning creditors in insolvent proceedings, under article third of the insolvent debtor's act, the discharge does not subvert the judgment as a lien upon the insolvent's real estate, although it extinguishes it as a personal debt against the insolvent. (*Per Morgan, J.*) (*Kelly agt. Thayer, ante*, 163.)
2. The lien of a levy made under an execution issued on final judgment obtained in a state court, before the filing of a petition of a creditor to declare a debtor an involuntary bankrupt, is preserved by the bankrupt act, and is to be respected by the United States District Court, sitting in bankruptcy, whether the said court takes to itself the administration of the property on which the lien is imposed, and applies it towards the satisfaction of the lien, or whether it allows the state officer who is executing

the process of the state court to do so. (*Matter of Bernstein, ante*, 289.)

3. But it must appear that the judgment and execution of the state court are obtained *bona fide*, and without collusion with the debtor. (*Id.*)

INSURANCE.

1. The city of New York being the owners in fee of the lots upon which the late Crystal Palace building was erected by the lessees from the city for a term of years, which lease having expired, and the possession of the lots and building having been surrendered to the city; and the city thereafter procured a policy of insurance upon the building substantially corresponding with previous policies which had been issued upon the building:
2. Held, that the city had an insurable interest in the building, which entitled them to recover upon the policy, after the destruction of the building by fire:
3. Held, also, that the premium having been adjusted by the assurers with reference to the nature of the risk, they could not justly complain that the property was dedicated to the uses contemplated by them as well as the assured, and embraced in the descriptive terms of the policy. (*Mayor, &c., N. Y. agt. Exchange Fire Ins. Co. ante*, 103.)
4. In a marine policy of insurance with the clause "In case the note or obligation given for the premium herefor be not paid at maturity, the full amount of premium shall be considered as earned, and this policy becomes void, while said note or obligation remains overdue and unpaid." His note given for the premium became due and was protested, and while thus unpaid, the vessel insured was lost: Held, that the right of recovery by the insured was at an end. (*Wall agt. Home Ins. Co.* 36 N. Y. R. 157.)
5. Held, further, that an agreement by the company that the note might lie over a few days did not waive the forfeiture or restore the right of action upon the policy. (*Id.*)
6. In the case of a marine insurance company which has become bankrupt, and of which receivers have been appointed, where a note had been given by the assured for the premium upon a vessel, and where a general average loss had occurred before the bankruptcy: Held, that the loss was a credit within the statute of "mutual credits," although not adjusted by the

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- parties until after the bankruptcy, and although no extended time of payment was asked or given. (*Osgood agt. De Groot*, 36 N. Y. R. 348.)
7. *Held*, that only the balance due upon the premium note, after deducting the amount of the loss, could be recovered from the makers. (*Id.*)
8. *Held, furthrr*, that the provision in the policy, that the amount of premium note and all other debts to the company should be first paid or secured, before anything should be due upon a loss to the insured, was intended primarily for the protection and security of the company, but that it also created the reciprocal obligation, that the company should not demand payment of the note until they had paid all losses. (*Id.*)
9. *Holbrook agt. Receivers of American Insurance Company* (6 Page 220), discussed and approved. (*Id.*)
10. An agent, authorized to take applications for insurance, should be deemed to be acting within the scope of his authority where he fills up the blank application of insurance; and if, by his fault or negligence, it contains a material misstatement, not authorized by the instructions of the party who signs it, the wrong should be imputed to the company, and not to the assured. (*Rorley agt. Empire Ins. Co.* 36 N. Y. R. 550.)
11. A policy of insurance should not be avoided for an error by the agent of the company, acting within the general scope of his power, on the artificial and unwarranted assumption that he is the agent of the other party to the contract. (*Id.*)
12. When a policy of insurance is upon a building and a stock of goods, &c., such as is usually kept in country stores, it covers all articles of merchandise coming within such description, even though it include articles generally prohibited except at special rates. (*Pudar agt. Kings Co. Mutual Ins. Co.*, 36 N. Y. R. 648.)
13. The policy of insurance contained a condition to the effect that it was optional with the insurance company, in case of a loss, to rebuild or repair the buildings within a reasonable time, giving notice of their intention to do so within thirty days after service of the preliminary proofs. Immediately after a loss by fire the plaintiff laid a new foundation and proceeded to the erection of a new brick building. Within thirty days the defendants gave notice that they availed themselves of the option and would rebuild the property. The plaintiff refused to permit them to do so, and continued the erection of his building. In an action upon the policy, it was held that the plaintiff could not maintain his action. (*Beals agt. Home Ins. Co.* 36 N. Y. R. 522.)
14. It was further held, in accordance with *Morrell agt. Irving Insurance Co.* (33 N. Y. 429), that under these circumstances the contract became substantially a building contract, for which insurance company had received the payment in advance. (*Id.*)
15. A policy of insurance upon merchandise continues in force so long as the goods remain in the building specified therein, during the time it has to run, unless the contract is modified by the assent of both parties. Insurers who are bound by the terms of the policy, for a loss occurring during the time covered by it, if they claim any variation of their original responsibility by a new agreement, must establish it by clear and indubitable evidence. (*Kunze agt. American Exchange Fire Ins. Co.* 2 Robt. 443.)
16. A party insured being about to remove his stock of goods to another store, applied, by his agent, to the insurers to procure from them an ordinary transfer of the policy on the goods from the old to the new store. The secretary of the insurers told the agent, who described the property to him, to "let the policy remain as it was," and when it expired "it (meaning the premium) will be less than now." The agent, who left the policy with him, promised to call for it, later in the day, but failed to do so. Before the goods were removed from the original store, a loss by fire occurred: Held that there was no valid agreement varying or displacing that contained in the policy; and that the insurers were liable, under such policy, for the loss. (*Id.*)
17. All the owners of a ship separately authorized and instructed S. & T. to keep their several interests in her insured, valuing her at a certain sum; each giving such direction separately, without reference to the interests of others. S. & T. obtained from the Atlantic Mutual Insurance Company a policy by which it insured them, by their firm name, in the sum of \$9,375. "on account of whom it may concern," loss, if any, payable to S. & T. The sum so insured was the same proportion of the sum at which the vessel was valued in the instructions to insure, (three sixteenths,) as the interest of the

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plaintiffs and one F. in the vessel was of the whole. No disclosure was made to the company, at the time, either of the parties or the interests to be insured. A series of similar policies, covering three-quarters of the valuation of the vessel, were also taken out by S. & T. in other companies. One third of the premium paid by S. & T. upon the policy issued by the Atlantic Mutual Insurance Company, was charged by them upon their books to each of the plaintiffs and to F.; and about the same time similar charges were made, in such books, against other owners of the vessel, for premiums paid on such other policies upon the vessel, and accounts were rendered to the plaintiffs and such other owners, from time to time, embracing those items: *Held*, 1. That the Atlantic Mutual Insurance Company, by their policy agreed to become liable to such persons as S. & T. intended and were authorized to insure; and that they trusted to, and agreed thereby, to rely on the usual manifestations of such intent by the acts, declarations and relations of the latter. 2. That entries in the books of S. & T. according to the usual mode of dealing by insurance brokers with their principals, to be transferred, subsequently, into the accounts to be rendered to the latter, became substantially a part of the *res gestæ*, and were an admission against their interest, that they themselves were not the parties insured. 3. That the giving of authority by other owners, and the making of other policies of insurance, could not affect the admissibility of such entries as evidence, although they might tend to strengthen or diminish their effect as such. 4. The other owners, by employing the same insurance brokers as the plaintiffs did, agreed, substantially, with the underwriters, that such agents should determine to whose benefit policies of insurance made by them on such vessel should enure; and assented in the same manner to be bound by the usual modes of manifesting the intent of insurance agents, as to the parties to be covered by particular policies. 5. That the obtaining of other policies, about the same time, by S. & T. equal to the valuation of the interests under their care, their charging their premiums to different owners, and rendering accounts containing such charges, made the entire body of entries equivalent to a distribution of all the policies so obtained among the parties insured, within a reasonable time after they were made, by common agents, authorized to insure with whomsoever they

pleased. 6. That as regarded the owners, other than the plaintiffs and F., such entries were made in time to become part of the *res gestæ*, if they were made before anything occurred to actuate the agents by any other motive than that of discharging their equal duty to all. 7. That such charges against the parties intended to be insured, being made either in the books of the agents or in the shape of the memoranda to be entered therein simultaneously with the giving of their notes for the premiums, such entry of them was sufficiently near in time to the transaction of making the policy, to form a part of the *res gestæ*, to determine whose interest the policies were intended to cover. (*Forgay agt. The Atlantic Mutual Insurance Company*, 2 Robt. 79.)

18. As between insurer and insured, the owner of an insured cargo, not being the proprietor of the ship, has no rights, other than those possessed by the owner of a ship upon which a policy has been effected by him. (*Howard agt. The Orient Mutual Ins. Co.* 3 Robt. 539.)
19. There is no difference as between insurer and insured, between the owner of an insured cargo, on board of his own ship, and on one whose property is laden on board of the vessel of another, who, by employing such vessel to transport the same makes the master his agent and representative, for the purposes of the voyage. (*Id.*)
20. In either case, the assured warrants the seaworthiness of the vessel, and retains to himself the risk of all losses proximately caused by the perils insured against. (*Id.*)
21. In all contracts of marine insurance for a voyage, whether upon a vessel, its freight, or the cargo on board, the law implies an undertaking on the part of the assured that the vessel is of the character described in the policy, and that she is sufficiently seaworthy, at the commencement of the voyage, to perform the same. (*Id.*)
22. The rule is now well settled with us, that in all cases in which the following facts concur, the underwriter is exonerated from liability, viz: 1. Where the vessel which is, or contains, the subject matter of insurance, leaves an intermediate port, whether a port of call or of distress, in an unseaworthy condition. 2. Where such condition is owing to the gross or culpable negligence of the master. 3. Where the property insured becomes lost or damaged because of the particular defect

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- that rendered the vessel so unseaworthy, or by some means to which such defect directly contributed. (*Id.*)
23. A surveyor's certificate, being an *ex parte* proceeding, is not admissible as evidence for the plaintiff, in an action on a policy of insurance, to prove what repairs to the vessel were necessary to be made, and the expense of such repairs, in the absence of all evidence tending to substantiate its correctness. (*Id.*)
24. A policy of insurance against fire, purported to cover "merchandise hazardous, not hazardous, and extra hazardous, their own, or held by them in trust or on commission or joint account, &c., in all or any of the brick or stone warehouses, and while in *transitu*, or on any of the streets, yards or wharves in the cities of New York, Brooklyn or Jersey City, and unless under the protection of a marine policy, subject to average clauses annexed..." To this policy was annexed this provision: "It is at the same time agreed that, if any specific parcel of goods included in the terms of this policy, or such goods in any specified building or buildings, place or places, within the limits of this insurance, shall, at the time of any fire, be insured in this or any other office, this policy shall not extend to cover the same, excepting only so far as relates to any excess of value beyond the amount of such specific insurance or insurances, which said excess is declared to be under the protection of this policy and subject to average as aforesaid." The fire occurred at one of the places where the insured had merchandise to the value of \$386,026. They had a specific insurance on the goods in that store to \$324,000. The loss and damage occasioned by the fire was \$274,192. In an action upon the policy, to recover of the insurers a *pro rata* amount of the loss in proportion to the amount insured: *Held*, that the true interpretation of the policy was that, if a loss occurred, and the specific insurance exceeded the loss, the party insured was protected thereby, and had no claim under the general policy; that, if the specific insurance fell short of the loss, insured might recover on the general policy for such excess. (*Fairchild agt. The Liverpool and London Fire and Life Ins. Co.* 48 Barb. 420.)
25. *Held*, also, that the fact that the whole loss was covered by and to be paid by the specific insurance, established a defense, under the policy, that there was no loss chargeable thereon. (*Id.*)
26. In time policies, the rules as to devia-
- tion do not apply to the same extent as in voyage policies. (*Bearns agt. The Columbian Insurance Company*, 48 Barb. 445.)
27. Under time policies, the mere intention to deviate is not sufficient to avoid the policy, although during the period of the violation of the warranty the vessel is not covered by the policy. (*Id.*)
28. Time policies were issued by the defendants upon the bark Cora and her freight; the policy on the vessel being for one year from June 19, 1862, and that upon the freight being for one year from June 20, 1862. The policy on the vessel contained a warranty not to use the Min river (in China) higher than the anchorage below the Kimpai pass. The bark sailed March 29, 1863, from Shanghai to Newchang, at the mouth of the Lian Ho river, in the northern part of China. In entering the Lian Ho river, the vessel was damaged, but the injuries were not such as to make her unseaworthy. On the 4th of May, 1863, the bark took in a cargo for Fuchau-fu, a port on the Min river, and sailed therefor. On leaving Newchang she sustained more serious injury. After she left the Lian Ho river, she sustained no further disaster. On the 13th of June, 1863, she arrived at Pagoda anchorage, ten miles above Kimpai pass, on the Min river. Upon a survey held there, it was found that she was badly injured, and it was decided to dismantle and sell the vessel, which was done. It being admitted that the injuries were sustained in entering the mouth of the Lian Ho river, on the voyage to Newchang, and on leaving that port at the same place, during the period the vessel was covered by the policy: *Held*, that upon these facts, there was nothing to warrant the court in holding that the insured was not entitled to recover for damage done to the vessel while she was not in violation of any of the provisions of the policy. That it was not in any way within the prohibition either to enter or leave the port of Newchang and the Lian Ho river; and whatever was intended after the vessel left that port could in no way affect the plaintiff's right of recovery for any damage previously incurred. (*Id.*)
29. *Held*, also, that the policy upon the freight being intended to cover the freight during the whole period of insurance, and not confined to the period when the vessel sailed from the Lian Ho river, the warranty was violated when she entered the Min river above the Kimpai pass that it mattered not

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what was determined upon afterwards, or what befell the vessel while that violation existed, the policy ceased to cover the freight from that time. And the vessel having been sold while in the river, and before the violation of the warranty terminated, the plaintiff could not recover for freight thereafter. (*Id.*)

30. Where a policy of insurance upon a vessel contained a warranty not to use any ports in the British North American provinces, except between the 15th of May and 15th of August: *Held*, that the warranty was broken by sailing on a voyage from Boston to a prohibited port, on the 24th of September, when the vessel was lost before reaching the port. (*LEONARD, J., dissenting.*) (*Snow agt. The Columbian Insurance Company, 48 Barb. 469.*)

31. A fair construction of such a contract would seem to require that the prohibition to use certain ports was intended to guard against the dangers incurred in reaching them; and where the sole object of a voyage was to do an act forbidden by the policy, the insurer should not be held liable for any loss occasioned by it. (*Per INGRAHAM, J.*) (*Id.*)

JOINT CONTRACTORS.

1. The 136th section of the Code does not alter any fundamental principle of law as to the joint liability of joint contractors, but was intended to alter the common law on a point of practice only. (*Niles agt. Battershall, 2 Robt. 146.*)

2. The legislature intended by that section to change the former rule of practice by which, if any number of persons or joint contractors were sued, it was necessary to prove and establish an entire case against all the defendants, or the action would fail; so that the plaintiff might recover against so many of the defendants against whom he can prove a joint contract, and a consequent joint liability. (*Id.*)

3. That section does not permit a separate judgment to be entered against one of two or more defendants proved to be joint contractors, and therefore jointly liable, even though that defendant should be the only one served, or who appears, while the others remain on the record as defendants. (*Id.*)

JUDGMENT.

The doctrine is well settled, that the assignee of a chose in action, not negotiable, takes the thing assigned subject to all the rights which the debtor had

acquired in respect thereto, prior to the assignment. (*Blydenburgh agt. Thayer, ante, 88.*)

2. Where A. loaned B. his promissory note for the exclusive benefit of B., the payee, who was at the time largely indebted to A.; and B., before the maturity of the note, transferred it to C., as collateral security for the sum of \$50 borrowed money (the note being \$950), C., after the maturity of the note, commenced an action against A., and obtained judgment upon the note. D. sold to B. property, for which he took in payment an assignment of this judgment from C., and paid C. his \$50 and interest; neither C. nor D. having any notice of the defense or set-off to the judgment by A.:

3. *Held*, that nothing having been done by A. which estopped him from setting up his equities as against either B., C. or D., the judgment was only available in the hands of either of them to the extent of the \$50 advanced by C., and the interest thereon, and the costs of the action. On the payment of these sums, A. was entitled to have the judgment cancelled. (*Id.*)

4. In an action to reach the property of a judgment debtor to satisfy a judgment, it was held, that it was a fatal defect to the complaint that it did not aver that the execution issued upon the judgment had been returned unsatisfied, in whole or in part. (*Beardsley Scythe Co. agt. Foster, ante, 97.*)

5. Also held, that the plaintiff had no right to claim an enforcement of the contract between Osborn and the defendant. (*Id.*)

6. Also held, that it was erroneous and improper to include in the judgment of affirmance, on appeal, the judgment rendered at special term. That the only judgment rendered on affirmance, and with costs, was for the costs of the appeal; and that when, as in this case, judgment had been entered up, not only for the costs awarded on affirmance, but for the amount of the judgment of the special term, it was the duty of the supreme court to amend the judgment by striking therefrom the judgment of the special term, and that the same should stand only for the costs awarded on affirmance. (*Id.*)

7. The practice which prevailed before the Code, of moving for judgment, as in case of nonsuit, for not bringing the case to trial, on showing that later issues upon the calendar had been tried, is still continued under the present revi-

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- sion of the rules, by rule 27. (*Kimberly agt. Parker, ante*, 275.)
8. But this practice, as well as the rule referred to, govern the disposition of only such causes as may be noticed and placed upon the calendar for trial at the circuit. It is entirely unadapted to causes that have been referred. (*Id.*)
9. Before the revision of the rules of 1847, the only mode in which the defendant could dispose of an action which had been referred, was to apply to the court, by special motion, for leave to notice and bring on the trial of the cause himself; and if such leave was given, to notice the cause for trial, and obtain a report against the plaintiff. The substantial advantages secured by this practice to the defendant have been preserved and continued by the Code, by conferring upon him the right to notice and bring on the trial before the referee, without any special leave of the court. (*Id.*)
10. By the revision of the rules of 1847, rule 43 allows the defendant, without procuring leave to notice and bring on the hearing himself, to give notice to the plaintiff, requiring him to bring the cause to trial within forty days; and if he fails to do so, the defendant is at liberty, upon showing these facts, to move for judgment, as in case of nonsuit. (*Id.*)
11. There is nothing in the authority conferred by the Code upon the defendant, to notice the cause for trial himself, that is inconsistent with the continuance of this practice under rule 43. Both may exist together, without any real or apparent conflict whatever. (*Id.*)
12. Therefore, under the state of practice provided for by the Code, allowing the defendant to notice the cause and bring on the trial, the previous practice, providing for motions for judgment as in case of nonsuit, are still available in actions that have been referred. (*Id.*)
13. But the defendant cannot move for judgment as in case of nonsuit, under the 43d rule, without first giving the notice requiring the plaintiff to bring on the trial of the action, as that rule prescribes. That notice, as well as the plaintiff's default in complying with it, are indispensably necessary to entitle the defendant to judgment, as in case of nonsuit, where the action has been referred. (*Id.*)
14. A motion for judgment as in case of nonsuit cannot be made by a single defendant, under section 274 of the Code, as that section provides only for those cases where there are several defendants, and the plaintiff has unreasonably neglected to serve the summons on some or one of them, or to proceed in the cause against the defendant or defendants who may have been served. (*Id.*)
15. The right of a plaintiff to costs, where an offer of judgment under the Code has not been accepted, depends on the recovery of a judgment more favorable to him than the offer. (*Tompkins agt. Ives*, 36 N. Y. R. 75.)
16. Though ten days are allowed for the acceptance of such offer, it has relation, whether it be accepted or declined, to the condition of the cause at the time it is served. (*Id.*)
17. If, subsequent to the offer, a counter-claim is pleaded, proved and allowed in the judgment, its extinguishment is to be deemed beneficial to the plaintiff to the extent of the amount so allowed. (*Id.*)
18. An objection to a judgment in foreclosure, that the court rendering final judgment in the case was not composed of the same judges who rendered the preliminary judgment, ascertaining and settling the rights of the parties, and ordering a judgment, is without force. (*Chamberlain agt. Dempsey*, 36 N. Y. R. 144.)
19. An interlocutory judgment is in aid of the final judgment; and an appeal from the final judgment brings up for review such previous interlocutory orders. (*Id.*)
20. In an action to foreclose a mortgage, it is proper for the court to order a reference to ascertain the amount due upon the mortgage, and also the amount due upon any other mortgages set up in the answer; and also to ascertain whether there are any prior liens by mortgage upon such premises. (*Id.*)
21. The supreme court has the same authority to amend the statement and confession of judgment as it has in relieving against defaults and slips in practice. (*Union Bank agt. Bush*, 36 N. Y. R. 631.)
22. Where an ejectment suit was brought by the assignee of the lessor, against the assignee of the lessee, for the non-payment of rent on a lease containing a covenant for re-entry, and a judgment was rendered therein in favor of the plaintiff, for the recovery of the possession of the premises: *Held*, that such judgment was a bar to a recovery in an action brought by a party claiming through the purchaser at a foreclosure

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- sale, under a mortgage executed by the assignee of the lessee, subsequent to the date of the lease, but prior to the commencement of the ejectment suit; the judgment of foreclosure being entered after the ejectment suit was instituted, but previous to its termination. (*Bennett agt. Couchman*, 48 Barb. 73.)
23. Held, also, that the lessee was a privy to the lessor, and the defendant in the ejectment suit (the assignee of the lessor, was also a privy. That the grantee in the mortgage executed by such defendant took subject to the rights of the lessor; and that the sale of the premises under the foreclosure proceedings did not in any way affect or impair those rights, or give the plaintiff any title as against the defendant. (*Id.*)
24. Held, further, that the title which the plaintiff claimed through and under the defendant in the ejectment suit, being perfected by the foreclosure proceedings after the ejectment suit was commenced, the judgment in the latter suit, in connection with the title which the evidence established, under the lease, was conclusive against the plaintiff. (*Id.*)
25. Irregularity in form does not render a judgment void. The irregularity can only be taken advantage of by the party on motion. (*Id.*)
26. There is no objection to an admission by the defendant, in writing, of the facts alleged in the complaint, in order to save the necessity of proving those facts. (*Id.*)
27. And a judgment entered upon such written admission may be considered as a judgment entered by default, the answer having been withdrawn. (*Id.*)
28. Where parties reside within the jurisdiction of the court, and more than two years have elapsed since the entry of judgment upon an inquest, and service of notice thereof upon the defendant, a motion to open the inquest and set aside the judgment will not be granted. (*Hendricks agt. Carpenter*, 2 Robt. 625.)
29. In March, 1864, the plaintiff's attorney filed a request in the office of the clerk of this court, requiring him to docket a judgment against the defendant. The clerk filed it, and gave the plaintiff a transcript, on the same day, which was filed in the county clerk's office, as required by law; but no actual entry was made in the judgment book, by the clerk of this court, until May following (1864), after an execution had been issued upon the judgment. Held, that this was a substantial compliance with section 230 of the Code, as between the parties to the judgment; and that the docket in the county clerk's office was a sufficient foundation for the execution. (*Appleby agt. Barry*, 2 Robt. 689.)
30. Although the court may retain enough control of an action, after judgment, in order to carry it into effect, yet it can only adjudge and dispose of the rights of the parties in the judgment. (*Prestiss agt. Machado*, 2 Robt. 660.)
31. After a judgment has been entered, declaring an assignment void, and ordering the assignee to deliver over to a receiver enough of the assigned assets to pay the plaintiff's claim, and in case of a refusal, directing a referee to take an account of moneys in the assignee's hands; and such account has been taken, and a report made and confirmed, showing more than enough in the assignee's hands to pay the plaintiff's claims, the court will not, on motion, make an order or addition to the judgment, requiring the assignee to pay such amount to the plaintiff, in order to enable the latter to sue upon such addition in another state. (*Id.*)

JURISDICTION.

1. Where the parties stipulated that a motion noticed for a special term might be heard before the judge at chambers, with the same effect as though heard at special term, and that, upon filing his decision, an order might be entered in pursuance thereof, "as of the special term":
2. Held, that an order purporting to have been made by the judge "at chambers, as of special term," could not be supported as an order of the court, and an appeal from an order thus entered was dismissed. (*Kelly agt. Thayer*, ante, 163.)
3. Quere—Whether the decision of a judge at chambers, under such a stipulation amounts to an award? (*Id.*)
4. To give effect to the intention of the parties in such a case, the prevailing party should enter the order as an order of the special term, without reciting the stipulation, or noticing the fact that it was heard at chambers, instead of being heard at special term. (*Id.*)
5. It seems the court at special term would refuse to set aside an order thus entered, upon the ground that the party was estopped by his stipulation. (*Id.*)
6. Where an order has been entered up by inadvertence, which plainly frus-

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trated the object the parties had in view in entering into the stipulation, it seems the court at special term may set aside both the order and stipulation. (*Id.*)

7. On certiorari to review the decision of referees in laying out a highway, the authority of the supreme court is confined to an *affirmance or reversal* of their proceedings and decision. (*People agt. Ferris, ante.* 189.)
8. Where the supreme court on such review made an order vacating the decision of the referees, and that the "order appointing them be set aside, the appeal to stand, to be determined by a new board of referees, to be appointed by the county judge:" *Held*, that the court exceeded its authority. The latter part of the order granted was void. (*Id.*)
9. It is the practice of courts of review to reverse judgments and orders granted *without jurisdiction*. (*Id.*)
10. The 17th section of the act of congress, which provides that the circuit courts of the United States shall not "have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made," applies to a claim against a railroad company, as a common carrier, to recover the value of goods entrusted to it for transportation; such a claim being a chose in action. (GEO. G. BARNARD, J. dissented.) (*Ayres agt. The Western Railroad Corporation, 48 Barb.* 132.)
11. Manner of acquiring jurisdiction, etc., over stockholders, under the law of 1849 (ch. 226). (*Diven agt. Lee, 36 N. Y. R.* 302.)
12. The power of a court to compel a return of money paid to one of its officers in his official capacity, under a mistake, is entirely different from any liability of such officer to repay it to the party so paying it, produced by a mere modification of any order under which it may have been paid to the party who paid it to such officer. (*Getty agt. Campbell, 2 Robt.* 664.)

JURORS.

1. Where one called as a juror in a capital case states that he has conscientious scruples as to finding a verdict in a case involving life and death, he is to be deemed incompetent to sit in such case.

(*O'Brien agt. The People, 36 N. Y. R.* 276.)

2. Where a juror, called in such case, states that he read the newspaper accounts of the transaction, but that they left no particular impression on his mind as to the guilt of the person named, other than that the crime had been committed by the person named, he is not to be deemed disqualified to sit in such case. (*Id.*)

JUSTICES OF THE PEACE.

1. The general power of amendment, given to courts of record, in sections 172 and 173 of the Code, does not belong to justices' courts; nor do any of the general provisions in relation to the amendment of process and pleadings, contained in other parts of the Code and in the Revised Statutes, apply to justices' courts. (*Gilmore agt. Jacobs, 48 Barb.* 336.)
2. Where the summons, in a justice's court, is sued out and served upon two defendants, the name of one of them cannot be dropped, in the subsequent proceedings, without leave of the court. But if the justice permits the plaintiff to declare against one of two joint defendants only, he will be deemed to have allowed an amendment of the summons, for that purpose, if he had any power to do so. (*Id.*)
3. A justice of the peace has no power to grant an amendment allowing the plaintiff to strike out the name of a defendant from the summons, after service thereof, and to proceed to trial and judgment against the other defendant alone. (*Id.*)

LANDLORD AND TENANT.

1. Where the landlord, the owner in fee of the demised premises, claims that the term of the tenant has expired, enters without process and without force, during the temporary absence of the tenant, he is justified in using so much force as is necessary to defend himself and maintain his possession of the premises. (*Sage agt. Harpending, ante,* 1.)
2. An owner of real property is liable for injuries caused to third persons by its defects, notwithstanding the premises are at the time in possession of a tenant, if the defects existed when the tenant took possession. (*Moody agt. Mayor, &c., ante,* 288.)
3. The owner of land out of possession may maintain an action for an injury to

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- the land, to the inheritee. (*Freer agt. Stotenbur, ante, 440.*)
4. A lease of land for agricultural purposes does not give the tenant a right to work a quarry on the land. (*Id.*)
 5. If, in an action between a tenant and a trespasser claiming title, the defendant pleads title, and is defeated in the action, he cannot afterwards, in an action between himself and the landlord, litigate the question of title again. The first record is conclusive against him, notwithstanding the parties are different. (*Reversing S.C. 36 Barb. 641.*) (*Id.*)
 6. Where a parol agreement provided for the renting of premises for one month from the 1st of August, 1866, and for each successive month thereafter until the landlord should want the premises for his own use, whereupon the tenancy should expire: Held that under such an agreement a notice of thirty days was not necessary to terminate the tenancy. (*The People ex rel. Gleahill agt. Schackno, 48 Barb. 551.*)
 7. The notice served by the landlord upon a tenant at will, to terminate his tenancy, takes effect in thirty days after the service; and the specification therein of a day on which the time will expire, which will be less than thirty days from the time of service, will not vitiate the notice. (*Id.*)
 8. The affidavit by which summary proceedings for the removal of a tenant are initiated, need not state the date or duration of the lease. (*The People ex rel. Teed agt. Teed, 48 Barb. 424.*)
 9. The facts stated in such affidavit, and not denied by the affidavit of the tenant, are admitted. (*Id.*)
 10. Where the facts put in issue are the ownership of the premises, and the hiring thereof to the tenant, proof of a conveyance to the landlord, and the payment of rent to him by the tenant, establishes both of these issues against the tenant. (*Id.*)
 11. If the nature of the hiring was such that the landlord could not take the remedy by summary proceedings, the tenant must set up that defense. (*Id.*)
 12. The statute requiring that upon summary proceedings an officer shall be sworn to keep the jury, &c., is directory in that respect; and though the return does not show that an officer was sworn, the court cannot infer that the jury were not kept by an officer, or that he was not sworn. (*Id.*)
 13. It being the duty of the magistrate to swear an officer, the intendment of the law, in the absence of proof to the contrary, is that he performed his duty. (*Id.*)

LEGACY.

1. At common law, the general rule is that *interest upon a legacy* is payable only at the expiration of a year from the testator's death. (*Cook agt. Meeker, ante, 115.*)
2. But where a sum is left in trust, with a direction in the will that the interest and income should be applied to the use of a person, such person is entitled to interest therefrom from the date of the testator's death. Especially is this so, when by the will it appears clearly to have been the intent of the testator that the legacy should be paid by a transfer of bonds and mortgages bearing interest at the time of his death. (*GROVER, J. dissenting.*) (*Id.*)
3. The provision of the Revised Statutes (2 R. S., p. 90 § 43) is in affirmation of the doctrines of the common law, and has not changed the rule as to the time when interest on legacies begins to run. (*Cooke agt. Meeker, 36 N. Y. R. 15.*)
4. Where an annuity is given, if by implication from the terms of the instrument the legacy be given for support, interest commences immediately from the death of the testator. (*Id.*)
5. It is not essential that the amount of the legacy should be clearly known at the time of the testator's death. (*Id.*)
6. Where a sum is left in trust with direction that the interest and income be applied to the use of a person, such person is entitled to interest from the death of the testator. (*Id.*)

LEGISLATURE.

1. It is competent for the legislature to repeal an existing law, absolutely, or continue it in force, as to proceedings commenced under it, or to substitute a new law in its place and direct that all future proceedings in the progress of an action shall be governed by such new law. (*The Tribune Association agt. The Mayor, &c. of New York, 48 Barb. 240.*)

LEASE.

1. Ownership of a good title, by a lessor, is not a condition precedent to his right of recovery for breach of a covenant on the part of the lessee to renew. The inability of the former to give a good

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title is matter of defense, to come from the defendant; who cannot set up such a defense under an allegation in his answer that as to the plaintiff's "authority to lease," he has not sufficient knowledge and information to form a belief in relation thereto. (*Ryder agt. Jenny* 2 Robt. 56.)

2. A lease contained a covenant for a renewal at its expiration, for the further term of twenty-one years. At such expiration a lease was tendered by the lessor renewing the original lease for the further term of twenty-one years, "at the same rent," and otherwise upon the same terms, covenants and conditions as "were in the said original lease contained and expressed," which also contained a covenant that the lessor had full power and authority to grant said renewal, and a further covenant for the performance by both parties respectively of all the covenants and conditions, &c., contained in the original lease, and that the lessee would pay rent at and after the rate reserved, but in the manner specified in the original lease. Such new lease, however, did not contain a repetition of the covenants for renewal, or for quiet enjoyment contained in the original lease: *Held* that the insertion of such last mentioned covenants, in the new lease was not a matter of strict right, to be insisted on by the lessee, before he became liable to an action *at law*; and that the omission thereof did not prejudice him. (*Id.*)

3. In order to get rid of an award made by an umpire, fixing the value of demised premises, under the provisions of the lease, for fraud or misconduct, the party assailing it must either bring an action to set it aside, or ask for that relief affirmatively, in his answer. (*Id.*)

4. Where a lease, containing a covenant for renewal, provides for the appraisement of the value of the premises, at the end of the term, and for the payment of a specified per centage upon that valuation as rent under the renewed lease, the lessee is at liberty, until such appraisement is made, to consider himself tenant from year to year at the original rent. (*Id.*)

5. If the appraisement is delayed by the lessor, he is entitled to recover an amount equal to the advanced rent, with interest only from the day the renewed lease was tendered. (*Id.*)

6. Even if a covenant can be implied in a lease of premises to be used as a "boarding house," that when let they are suitable for occupation as a "board-

ing house," such a covenant cannot be extended, by implication, to "first class," or any particular description of boarding house not expressly designated in the lease. (*Roosevelt agt. Abbott*, 2 Robt. 156.)

7. In an action for rent by a lessor against his lessees, damages sustained by the latter by a breach of a covenant of the former contained in the lease reserving such rent, that the sub-cellars of the demised premises should, at all times during the term, be free from the "percolation" of water through the walls or floor thereof, cannot be set off. (*Bentard agt. Babcock*, 2 Robt. 175.)
8. The lessees in a lease containing such a covenant, are only entitled to compensation for actual loss arising from the expense of repairing past and preventing future evils, and deprivation of the temporary use of the building, or its permanent deterioration. (*Id.*)
9. Dampness of a store does not necessarily affect the value of the rent, directly, nor through the medium of actual injury to business or goods. Its effect upon the rent, in any other way, must be shown by witnesses who knew it. The jury are the proper judges of the extent of injuries to a tenant depending on fluctuating causes, when the facts are given. (*Id.*)
10. Without covenant on the part of a lessor to repair, damages sustained by a tenant by injury to merchandise from the leaky condition of the ceiling or roof of the demised premises are not the subject of recoupment, or counter-claim, in an action for rent; unless the lessor has bound himself by a special valid promise to repair the leak. (*Walker agt. Gilbert*, 2 Robt. 214.)
11. A promise by parol, made subsequently to the execution of the lease, needs a new and sufficient consideration to uphold it. (*Id.*)
12. A subsequent promise by the lessor, to repair, cannot be deemed to have been broken, except by his *neglect* to perform it, after sufficient time has been afforded him for that purpose. (*Id.*)
13. A promise by the lessor, to pay for damages after they have been sustained, or to allow the same upon the rent, made without any sufficient consideration, is not binding upon him; nor is the refusal to perform it available as a defense to an action for rent. (*Id.*)
14. A promise by a lessor, in such case, to a tenant, to pay the difference be-

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tween the price such goods would bring, in case they were sold at auction by him, and the invoice price, is not binding upon him, for want of a sufficient consideration, without a concurrent obligation by the tenant so to dispose of them; or some other valid consideration.)*Id.*)

15. The mere subsequently acting upon the lessor's suggestion, by selling the goods at auction, would not make the prior agreement mutual. (*Id.*)

16. A demise to a third person of premises in possession of tenants under a valid lease is void. It is neither effectual to disturb those in possession, nor to enable the lessee to evict them; and is no defense to an action for rent upon the original lease. (*Post agt. Martens, 2 Robt. 437.*)

17. A lease, signed as agent for the lessor, by a person not having authority in writing so to sign, cannot create the estate purported to be created in it, and is rendered void by the statute. (2 R. S. 135 § 6.) (*Id.*)

LESSEE.

1. To render the assignee of a lease liable for rent to the lessor, the whole term of the lease must have been assigned. Therefore, an assignment reserving the last day of the term, does not render the assignee liable to the lessor. (*Davis agt. Morris, 36 N. Y. R. 569.*)

LIBEL AND SLANDER.

1. The case of *Bush agt. Prosser* (14 N. Y. R. 347) and *Brisby agt. Shaw* (12 id. 67), settled two principles in the law relative to actions of libel and slander, under the Code:

2. *First.* That mitigating circumstances may be pleaded in connection with a general denial, and with or without a plea of justification.

3. *Second.* That all matters which tend to disprove malice may be pleaded in mitigation of damages, although they may tend to prove the truth of the words complained of. (*Dolevin agt. Wilder, ante, 488.*)

4. But these principles require that the defendant, seeking to mitigate damages by pleading facts and circumstances which induced him to believe the charge to be true at the time he made it, must state such facts and circumstances as would reasonably induce, in the mind of a person possessed of ordinary intelligence and knowledge, a belief of the truth of the charge. (*Id.*)

5. The pleadings should show that the defendant, at the time he made the charge, knew the facts and circumstances on which he relies. (*Id.*)

6. Also, the defendant should either expressly aver that such facts and circumstances induced a belief in the truth of the charge at the time he made it, or that the facts and circumstances should carry with them a reasonable presumption that he believed the charge to be true. (*Id.*)

7. Questions as to whether there was no malice in making the charge or if any, to what extent, are eminently proper to be submitted to the jury. The Code has made no change in the previous law on this subject. (*Id.*)

8. As mitigatory facts may now be pleaded, the rule governing the admission of evidence thereof should be applied as far as possible to the pleading. (*Id.*)

9. One of these rules of evidence is, to admit proof of any fact which might possibly bear on the question of malice. Another is, that, if there is the slightest doubt in the mind of the judge, as to whether the facts proposed to be proven tend to disprove malice, to admit the evidence and submit the question to the jury under proper instructions. (*Id.*)

10. These rules should now be applied upon a motion to strike out parts of an answer setting up facts and circumstances in mitigation of damages. (*Id.*)

11. Where the absence of averments, in an answer, forbids any presumption that, by any reason of the facts and transactions alleged, the defendant believed the charge to be true at the time he made it, such allegations will be stricken out on motion. (*Id.*)

12. Where the allegations in the answer tried to show that the words were uttered in the heat of passion, caused by the present acts and conduct of the plaintiff, they may be retained. (*Id.*)

13. Where the words used in an alleged libel ex necessitate expose the plaintiff to public ridicule or reproach, no explanation or application of the language employed is required; but when they are at all susceptible of an innocent construction, a complaint alleging that the publication tends to blacken and injure the reputation of the plaintiff and expose him to public hatred, contempt and ridicule, cannot be sustained, without an *innuendo* explanatory of the

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ambiguous words. (*More agt. Bennett, 48 Barb. 229.*)

14. A charge that a prostitute is under the patronage or protection of the plaintiff does not necessarily impute moral guilt; and where in a complaint upon such a charge, there was no allegation that the writer of the alleged libel intended to impute such guilt to the plaintiff; it was held that the complaint was fatally defective in not containing an innuendo. (*SUTHERLAND, J. dissenting.*) (*Id.*)

15. Where the words are so ambiguous that they may be understood in an innocent sense, the mere allegation of malicious intention is not sufficient. (*Per LEONARD, J.*) (*Id.*)

16. The removal of an individual from the place of policeman in the city of New York, by the Board of Commissioners of Police, solely upon the ground of his not having reported to such board the receipt by him of a gratuity for official service, will not justify the editors of a newspaper in therein stigmatizing his conduct as "blackmailing." The heading of a report of proceedings on his trial for such offense with the title "Blackmailing by a policeman," and its introduction by prefatory remarks stating that the plaintiff was dismissed from office "on charges of blackmail preferred against him by citizens in three distinct cases," was therefore held libelous, although the report itself, as a just and fair account of what occurred, was protected. (*Edsall agt. Brooks, 2 Robt. 29.*)

17. It is not sufficient to protect a publication of a transaction from the charge of being a libel that it contains a correct narrative of what occurred, provided it contains unwarranted deductions from the facts that occurred, tending to defame the party complaining. (*Id.*)

18. Although, in an action for a libel, charging in general terms the plaintiff with a specific crime or vice, such as theft, dishonesty or the like, an answer which justified such libel was demurable for not setting out the specific acts warranting such charge, yet, under the Code of Procedure which allows a motion to compel a defendant to make his answer more definite and certain, in an action for a libel charging certain exhibitions of the plaintiff with being such as to be an unfit resort for respectable persons, and in connection therewith the frequent attendance of persons of certain specified immoral or illegal occupations or pursuits upon

such exhibitions: Held that it was unnecessary in an answer justifying such supposed libel, to do more than reaffirm the statements contained therein, without specifying the names of such persons. Such an answer is good on demurrer, whatever it may be on a motion to make it definite and certain. (*Maretzke agt. Cauldwell, 2 Robt. 715.*)

19. The refusal of the city editor of a newspaper to publish a retraction of a libel published in such paper, does not tend to prove the *animus* of the proprietors to have been malicious; and evidence of such refusal is not admissible for the purpose of enhancing the damages in an action against them for the libel. (*Edsall agt. Brooks, 2 Robt. 414.*)

LIEN.

1. The lien of a levy made under an execution issued on final judgment obtained in a state court, before the filing of a petition of a creditor to declare a debtor an involuntary bankrupt, is preserved by the bankrupt act, and is to be respected by the United States District Court, sitting in bankruptcy, whether the said court takes to itself the administration of the property on which the lien is imposed, and applies it towards the satisfaction of the lien, or whether it allows the state officer who is executing the process of the state court to do so. (*Matter of Bernstein, ante, 289.*)

2. But it must appear that the judgment and execution of the state court are obtained *bona fide*, and without collusion with the debtor. (*Id.*)

3. The collection of wharfage, under the act of 1860, April 10, chapter 416 laws of 1860, can only be made in the manner pointed out in the 217th section of the act of April 9th, 1863, which is by a warrant to distrain the goods and chattels found on board of the vessel, for wharfage accrued under section 1 of the said act of 1860, and on the pier or bulkhead, for that accrued under section 3 of same act. (*Warren agt. McDiarmid, ante, 304.*)

4. It is not proper to bring an action to enforce such a lien. A receiver will be denied in such an action, even though a case therefor, as well as of wharfage and lien, is made out by the plaintiff. (*Id.*)

MALICIOUS PROSECUTION.

1. To maintain an action for a malicious prosecution, the plaintiff must prove,

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- 1st. That the defendant instigated the prosecution against the plaintiff; 2d. That such prosecution was without probable cause; 3d. That it was accompanied with malice, and terminated favorably to the party prosecuted. (*Müller agt. Milligan*, 18 Barb. 30.)
2. Malice, and a want of probable cause for the former suit, must both be alleged and proved. If there was probable cause, the action cannot be maintained, even though the prosecution complained of was malicious. (*Id.*)
3. Want of probable cause cannot be inferred from any degree of malice which may be shown. (*Id.*)
4. If there is an absence of proof to show that the defendant was the real prosecutor in the former suit; or if he was, that he was without evidence or circumstances justifying a reasonable suspicion of the truth of the charge then made, the plaintiff should be nonsuited, and has no legal right to ask a submission of the facts to the jury. (*Id.*)
5. Whether or not the defendant instigated the prosecution complained of, against the plaintiff, is a question of fact for the jury; and if there is any evidence whatever, upon that point, however slight it may be, the court is not authorized to dismiss the complaint and take the case from the jury. (*Id.*)
6. What constitutes probable cause? It does not depend upon the actual guilt or innocence of the accused, but upon the belief of the prosecutor concerning such guilt or innocence.) (*Id.*)
7. The real question is, whether the defendant had reasonable ground for believing that the plaintiff was guilty of the charge made against him. This belief may be founded upon facts within the knowledge of the party, or upon information derived from other persons. (*Id.*)
8. If he has positive proof of the facts, in the affidavit of another, and he believes the truth of that person's statement, and proceeds against the plaintiff upon that proof, and under a belief in its truthfulness, he will be deemed to have had probable cause for so doing. (*Id.*)
9. It is sufficient that such information was furnished to the defendant, as of itself would authorize and justify his action. The force and efficacy of the information will not be diminished by the introduction of evidence to show probable cause for the defendant's action, upon other and different grounds. (*Id.*)
10. If the testimony on the trial is conflicting and contradictory, and cannot be well reconciled, the question whether there was probable cause should be submitted to the jury. (*Id.*)

MANDAMUS.

1. Directed to county treasurer to compel him to pay over moneys collected to pay town bonds, it is a good defense to show that the necessary assent of the tax payers had not been obtained. (*People agt. Mead*, 38 N. Y. 224.)

MARINE INSURERS.

1. Marine insurers are bound to know the customs of the place where they transact business, and are assumed to have made their contracts in reference to such customs. A custom by which an account was kept of the shipments of cotton by a merchant in Appalachicola, on account of correspondents named, which were entered in a book kept by such merchant and reported to the agent, the premiums for which were paid, comes although the risk did not terminate before either of them. (*Hartshorn Insurance Company*.)
2. As between plaintiff and third persons insured, the plaintiff's contract being prior in point of time, gives him priority of right; and he is to be protected in preference to subsequent parties. (*Id.*)
3. The agent having in due and legal form, by certificate issued to the plaintiff, insured all cotton described therein to be thereafter shipped to him, could not deprive the party of the benefit of that insurance by subsequently insuring others. (*Id.*)

MARRIAGE.

1. The supreme court has no inherent power to declare a marriage contract void, or to decree a limited or an absolute divorce. Whatever power it possesses is given by statute; and it can exercise no power, on the subject of divorce, except what is expressly specified in the statute. (*Peagnot agt. Phelps*, 48 Barb. 566.)
2. The court has no jurisdiction to declare a marriage void, on the ground that a decree for divorce was obtained against the defendant by her former husband,

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for adultery, in which decree she was forbidden to marry again until her said husband should be dead, and that in disobedience of this provision she and the present plaintiff went to another state and were there married. (*Id.*)

MARRIED WOMEN.

1. It was neither the purpose nor the effect of the acts of 1848 and 1849 to put the property of married women beyond the reach of remedial process, or to secure to the *feme covert* a mere barren and dormant title. (*Owen agt. Cawley, 36 N. Y. R. 600.*)
2. By the operation of these acts, the antecedent disabilities incident to the conjugal relation were so far modified as to secure the wife in the beneficial enjoyment of the new interests she was permitted by law to acquire. (*Id.*)
3. She was still left without capacity to bind herself personally by a naked promise, note or bond; but she could exercise the right of an owner by subjecting her estate to equitable charges for her own benefit. (*Id.*)
4. When services are rendered for a married woman by her procurement, on the credit and for the benefit of her separate estate, there is an implied agreement and obligation, springing from the nature of the consideration, which the court will enforce by charging the amount on her property as an equitable lien. (*Id.*)
5. Where a charge is created by her own express agreement, for a good consideration, though for a purpose not beneficial to her estate, or even for the sole benefit of her husband, she is bound in equity by the obligation she thus deliberately chooses to assume. (*Id.*)
6. A married woman is at liberty to avail herself of the agency of her husband, as if they had not been united in marriage. (*Id.*)
7. When an absolute and unqualified admission is made in a pending cause, whether by written stipulation of the attorney or as a matter of proof on the hearing, it cannot be retracted on a subsequent trial, unless by leave of the court. (*Id.*)
8. Under the statute of 1848, in respect to married women, and the amendments thereto, a *feme covert* can take, hold, enjoy and dispose of leasehold property, with the rents, issues and profits thereof, in the same manner and with the same effect as if she were a *feme*

sola. (*Vandervoort agt. Gould, 36 N. Y. R. 639.*)

9. The leasing of her separate by a *feme covert*, for a short time and for a fair rent, is not restrained by a clause in the instrument conveying the estate to her, prohibiting her from anticipating the estate, etc. (*Id.*)
10. The possession of the premises by the husband, claiming the same in his marital right, can in no sense be deemed to be adverse to the claim of one deriving title from the wife. (*Id.*)

METROPOLITAN POLICE.

1. The act organizing the metropolitan police district makes it the duty of the board of police to protect "strangers and emigrants," in the streets of the city of New York. (*Predorill agt. Kennedy, ante, 416.*)
2. The superintendent of police and the captain of the precinct will not be restrained, by injunction, from placing policemen in front of a public house, in which guests have been repeatedly subjected to unjust, exorbitant and illegal charges, and from giving warning to "strangers" about to enter "to be careful." (*Id.*)

MILITARY.

1. Where a soldier has been honorably discharged, under an order of the war department mustering the regiment in which he served out of service, such discharge exempts him from the performance of further military duty, even if he stands as a drafted man in another company at the time of his discharge from the army. (*Matter of Wright, ante, 207.*)
2. A *court martial* is a court of special and limited jurisdiction. It is called into existence for special and temporary purposes, and when these purposes are attained, it is dissolved and disappears. No general duty or power, with respect to the collection of the fines, is conferred upon the president of the court; and he is required to exercise such power as is given him in a specified way, and within a specified time. (*Id.*)
3. The first warrant shall be drawn within thirty days after the fines have been imposed, and the same may be renewed, or a new one issued at any time thereafter, within two years from the time of imposing the fines. (*Id.*)
4. A warrant against a person issued on

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the 25th day of June, 1867, reciting that the fine was imposed upon the 25th day of April, without specifying the year, is defective upon its face, and does not justify the holding the person fined under it. (*Id.*)

MISTAKE.

1. The delivery up of notes, checks or certificates of deposit, under mistake, etc., does not transfer the title, etc. (*Westerlo agt. De Witt*, 36 N. Y. R. 340.)

MOBS AND RIOTS.

1. Under the provisions of the act of April 13, 1855, to provide for compensating parties whose property may be destroyed in consequence of mobs or riots, notice to the public officers will not be required, where the party injured had no information in respect to which to give the notice. (*Ely agt. Supervisors of Niagara Co.*, 36 N. Y. R. 297.)
2. Where the property of the party had been thus destroyed, in an action against the board of supervisors of the county to recover for such damage, it is no defense to the action to prove that the houses destroyed were kept by the plaintiff as bawdy houses, and as a rendezvous of thieves, robbers, murderers, etc. (*Id.*)
3. To keep a bawdy house and a rendezvous for thieves, robbers and murderers, does not constitute such an act of carelessness or negligence as will prevent the guilty parties from recovering under the provisions of such act. (*Id.*)
4. A house kept as a house of ill fame, etc., is a public and common nuisance; but the destruction of the building and its furniture is not necessary to its abatement. (*Id.*)

MORTGAGE.

4. Where a mortgagee delivers manually his mortgage to a third person, to secure the payment of a debt of the mortgagee to such person, it does not necessarily follow that the intention of the parties was to transfer the bond. (*Merritt agt. Bartholick, ante*, 129.)
5. As a mortgage is but an incident to the debt which it is intended to secure, the logical conclusion is, that a transfer of the mortgage without the debt is a nullity, and no interest is assigned by it. (*Id.*)

6. The transfer of a mortgage does not of itself operate to transfer the bond; for the legal maxim is, the incident shall pass by the grant of the principal, but not the principal by the grant of the incident. (*Id.*)
4. The legal effect of an assignment of a mortgage from the mortgagee to the mortgagor is to extinguish it, so as to let in subsequent liens. (*Moore agt. Hamilton*, 48 Barb. 120.)
5. The sale of land under a statutory foreclosure of a mortgage is void, where there are no bidders present except the auctioneer, who bids in the property on behalf of the mortgagee. (*Campbell agt. Swan*, 48 Barb. 109.)
6. Whether a statutory foreclosure of a mortgage operates to bar an equitable interest in the land, unless such interest is specified in the statute as entitling the owner of it to notice of the foreclosure, except in favor of bona fide purchasers without notice of such equitable interest? Quere. (*Id.*)
7. Where it did not appear, by the affidavits on file, that notice of a statutory foreclosure of a mortgage was served upon the mortgagor, held, that it was ineffectual to transfer the legal title to the plaintiff, who purchased at the sale. (*Dwight agt. Phillips*, 48 Barb. 116.)
8. Where the affidavits on file showed service by mail on the mortgagor, at a particular place, without stating it to be the place of his residence, held, that the omission was fatal, and could not be supplied by an amendment on the trial which involved the validity of the foreclosure. (*Id.*)
9. The statutory proceedings to foreclose a mortgage are not proceedings in court, so as to authorize the court to supply omissions or remedy defects in the affidavita. (*Id.*)
10. It seems that the rights of a prior purchaser, in possession of lands under an executory contract of sale, are not affected by the statutory foreclosure of a subsequent mortgage, although he is served with notice of sale. (*Id.*)
11. It seems such purchaser can safely make payments on the contract, to his vendor, until he has actual notice of the subsequent mortgage. (*Id.*)
12. A pledge by a testator, prior to his decease, of stocks, to secure collaterally the payment of a promissory note given for the purchase money of land agreed to be conveyed, does not amount to such a mortgage, under the provisions of the Revised Statutes

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(vol. 1, p. 749, § 4), which makes an heir or devisee primarily liable for a mortgage by his ancestor or devisor, upon real estate descended or devised to him from or by such ancestor or devisor, as to bar a recovery upon such note against the executor of the maker. (*Wright agt. Holbrook*, 2 Robt. 516.)

13. The statute changes the common law as to *mortgages, only*. It does not refer to any other charge, incumbrance or lien upon the land, legal or equitable; so that where a promissory note is given by a purchaser for the purchase money, under an agreement binding the vendor to sell the land and apply the proceeds of the sale towards the payment of the note, before he can maintain an action upon it, if such contract can be regarded in the light of a *lien* upon the land, to be enforced in equity, it will not bring the case within the statute. (*Id.*)

14. Where parties, while in possession of premises under a contract to purchase, and a deed of the same, purchase overdue and unpaid mortgages of the vendors, upon the premises, they become by such purchase substituted in place of the mortgagees, and are entitled, by subrogation, to all the rights of mortgagees in possession. (*The Madison Avenue Baptist Church agt. The Baptist Church in Oliver street*, 2 Robt. 642.)

15. Such a purchase of outstanding mortgages, by the parties rightfully in possession, even though it be after suit brought by the vendors to recover the possession, vests in them the right to retain such possession until the mortgages are paid. This is a right which can be set up and made available by way of defense, if an action of ejectment be brought against the parties in possession. (*Per BARBOUR, J.*) (*Id.*)

16. And in a proper case, leave to amend the answer, or to file a supplemental answer, for the purpose of setting up this defense, will be granted, upon such terms as will protect the rights of the plaintiffs. (*Id.*)

17. Delivery of a mortgage, etc., unaccompanied by the bond intended to be secured thereby, transfers no title to the mortgage. (*Merritt agt. Bartholick*, 36 N. Y. R. 44.)

18. The mortgage is only an incident to the debt secured by it. (*Id.*)

MOTION.

1. In granting an order to compel a party to make an *affidavit* to be used on a motion, under section 401 of the Code,

the judge must be satisfied by competent and sufficient proof: *First*. That the party applying for it intends to make or oppose a motion; and, *Second*. That it is necessary for him, in making or opposing such motion, to have the deposition of some person who refuses to make a voluntary affidavit. (*Moses agt. Bunker, ante*, 212.)

2. It is usual to take the *affidavit* of the attorney applying for the order, as competent and sufficient proof of these matters. (*Id.*)
3. But where it appears from the *affidavit* upon such application that the motion intended is merely to make an *answer more definite and certain*, or that the person whose deposition is required is *incompetent*, or that the real object of the applicant is, under the guise of a motion, to obtain an *examination* which he otherwise could not get, the court is bound to refuse the order. (*Id.*)
4. Such an *ex parte* order affects the right of the opposite party, which authorizes him to move to set it aside, as he has a right to attend on the examination with his counsel and to cross-examine; and besides such attendance subjects him to trouble and expense, (*Id.*)
5. The order in this case set aside, on the ground that it appeared from the pleadings and papers that it was not intended for the legitimate purpose of obtaining depositions to be used on a motion, but for some other purpose; such, perhaps, as enabling the plaintiff to ascertain what line of proof it will be necessary for him to prepare to meet on the trial. (*Id.*)
6. Besides, the plaintiff had waited before making his application until his cause had been twice called for trial, and it could have been tried on its merits sooner than the motion could have been determined. (*Id.*)

MUNICIPAL CORPORATIONS.

1. The provision in the amended charter of the city of New York, imposing on the *Law Department* the duty of conducting all the law business of the corporation, was not intended to disable the city from prosecuting or defending suits without the consent of the corporation counsel; nor to deprive it of the ordinary right of suitors, to procure such additional professional aid as the circumstances of particular cases might require. (*Mayor, &c., N. Y. agt. Exchange Fire Ins. Co. ante*, 103.)
2. The city of New York being the own-

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ers in fee of the lots upon which the late Crystal Palace building was erected by the lessees from the city for a term of years, which lease having expired, and the possession of the lots and building having been surrendered to the city; and the city thereafter procured a policy of insurance upon the building substantially corresponding with previous policies which had been issued upon the building:

3. Held, that the city had an insurable interest in the building, which entitled them to recover upon the policy, after the destruction of the building by fire.
4. Held, also, that the premium having been adjusted by the assurers with reference to the nature of the risk, they could not justly complain that the property was dedicated to the uses contemplated by them as well as the assured, and embraced in the descriptive terms of the policy. (*Id.*)
5. Where, by a city charter, the mayor and common council are directed to construct sewers through the city, and to keep them in repair, if they accept and enter upon the performance of this duty, assessing the expense upon the property benefited thereby, negligence in the performance of their duty in this respect creates a liability which may be enforced by one suffering damages in consequence thereof. (*Barton agt. City of Syracuse*, 36 N. Y. R. 54.)
6. In the construction of sewers and in keeping them in repair, municipal corporations act ministerially, and are bound to exercise needful diligence, prudence and care. (*Id.*)

NEGATIVE TESTIMONY.

1. When may have the effect of positive testimony. (*Renwick agt. N. Y. Central Railroad Company*, 36 N. Y. R. 132.)

NEGLIGENCE.

1. In an action for negligence against a railroad company, where there is considerable evidence given on both sides as to whether or not the defendant's bell was rung before coming to the crossing where the collision occurred, it is not a case for a non-suit, but the question should be submitted to the jury. (*Renwick agt. N. Y. Central Railroad Co. ante*, 91.)
2. Although if the plaintiff had stopped his carriage at a point nearer the track, he might have seen the train, and avoid-

ed the danger, his not doing so is not necessarily negligence. (*Ernst agt. Hudson River Railroad Co.*, 32 How. 61.) (*Id.*)

3. In an action against a railroad company for negligence, in causing injuries and death where there is a conflict of evidence upon the facts, and the jury, by their verdict, adopt the view claimed by one of the parties, the appellate court will take the same view on the appeal. (*Sheridan agt. Brooklyn Railroad Co. ante*, 217.)
4. It does not alter the liability of the defendants that the wrong of a third party concurred with their own in producing the injury. (*Id.*)
5. A horse railroad company is guilty of negligence in not stopping their car when the strap attached thereto is pulled for that purpose to let off a passenger. (*Id.*)
6. Where it was claimed by the defendants that the deceased passenger, a lad nine years of age, was in fault in going on to the front platform of the car, and was knocked off the car while in motion, by another passenger, and that none of the defendants' servants contributed to the act:
7. Held, that the jury having found that it was the very act of the conductor in placing the lad upon the front platform, in order to make room inside the car for other passengers, which produced the result, the defendants could not escape liability, although the lad was thrown off by another passenger in getting off while the car was in motion. (*Id.*)
8. Ordinary capacity and ordinary care and attention in protecting themselves as passengers on a railroad, is all the law requires. This each is bound to give whatever his age or condition; and if he fails, he cannot call upon others to supply his deficiencies, or to compensate him for losses arising from its absence. (*Id.*)
9. In an action against a railroad company to recover damages for injuries arising from negligence, where from the evidence there is no doubt of the negligence of the party injured contributing to the injury, the plaintiff should be non-suited. (*Burke agt. Broadway and Seventh Avenue Railroad Co. ante*, 239.)
10. And this rule applies to an action brought on behalf of a child six years of age, who sustains the injury. (*Id.*)
11. "It was equally necessary for the

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- plaintiff to establish the proposition that he himself was without negligence and without fault. This is a stern and unbending rule, which has been settled by a long series of adjudged cases, which we cannot overrule if we would." (For GRIDLEY, J. *Spencer v. Utica and Schenectady Railroad Co.* 5 Barb. 237. (*Id.*))
12. Where, in an action brought by an administrator under the statute of 1847, &c., for wrongful act, neglect or default, in causing death, it is established by undisputed facts that the deceased, by his own carelessness, negligent and wrongful act, contributed to the cause which produced his death, the plaintiff should be non-suited. (For BOLKIA, J. (*This agrees with the next preceding case of Burns agt. The Broadway and Seventh Avenue Railroad Co.* (*Cyrus agt. Warren Chemical Works, etc.*, 220.)
13. The mere fact that an injury or death on the premises of a party, in his possession and under his control, creates no presumption of party. The only inquiry is whether the injury occurred showing a want of care on the part of the plaintiff to be charged, liability. (*Id.*)
14. The burden of proof in all cases of negligence is on the plaintiff. (*Id.*)
15. When it appears that a passenger is riding upon a railroad car in a place of hazard or danger, his negligence in *prima facie* proved, and the *sueo* is upon him to rebut the presumption. (Clark agt. *Eight Avenue Railroad Co.* *etc.*, 313.)
16. Where a passenger showed that the inside of the city railroad car was full, and that the platform was full, so that no more persons could stand thereon; that in this situation the car was stopped for him to get on; that while riding there the conductor called upon him and received his fare:
17. Held, that under such a state of facts, negligence could not be fairly imputed to the passenger for riding in that position. (*Id.*)
18. The law requires of those engaged in the carrying of passengers, the exercise of such care on their part and of their servants, as will insure the safe carriage of their passengers, so far as their safety depends upon the diligence and care of those engaged in such carriage. (*Id.*)
19. If the negligence of the carrier contributes to the injury of the passenger, it is no defense to the carrier, that the negligent act of another (a third person), contributed thereto, if the injury would not have occurred but for the negligence of the carrier. (*Id.*)
20. In an action to recover damages for losses by injuries to the plaintiff, caused by the falling upon his *sueo* of a wall and oven, which were in the course of erection by an adjoining owner, on his own premises, by reason of negligence and carelessness in their construction, evidence was given tending to show that the wall had been cracking and settling for some days; that it was apprehended that such wall would not stand until finished; that the wall and oven were pointed with mortar several times while being erected, that the arches cracked; and the foundation was not good; that the building was not strong enough to bear the weight of the oven; that the walls settled; and the building was anchored on one side only, when it ought to have been anchored on both: Held, that there being evidence tending to show want of skill, as well as negligence and want of care, in the erection, on the part of the defendant, which led to injury of the plaintiff in his person and property, the case should have been submitted to the jury on the question of fact, and that the complaint was improperly dismissed, on the trial, for want of proof of negligence. (Gambrell agt. Becker, 2 Rob. 291.)
21. If negligence and want of skill in an erection are averred in the complaint and proved on the trial, in such a case, that is all that is requisite to entitle the plaintiff to recover; provided he shows damage resulting to him by reason thereof. (*Id.*)
22. In an action to recover damage for personal injuries sustained by the plaintiff by reason of the negligence of the driver of a street car belonging to the defendants: Held that the judge was justified in refusing to charge that the failure of the plaintiff to look up and down the street, before attempting to cross the track, to see if a car was approaching, was negligence on his part, precluding his recovery. Also, in refusing to charge that the failure of the plaintiff to see or hear the car, was, under the testimony, such conclusive evidence of negligence on his part as to preclude his right of recovery. (Moss agt. *The Second Avenue Railroad Co.*, 2 Rob. 236.)
23. Held, also, that the judge was just

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fled in refusing to charge that the fact of the plaintiff's having fallen on the track did not affect the question of the defendant's negligence, unless accompanied with evidence of the driver's having actually seen him on the track, in time to have stopped the car before reaching him. (*Id.*)

24. *Held, further,* that the judge was correct in refusing to insert where they occur, the words in brackets, in the following instruction, viz: That to make out a case of negligence on the part of the defendants, the jury must be satisfied not only that the plaintiff fell on the track, and the driver's face was so averted from his horses as not to see him as he lay there, but that, if he had seen him, the car could have been stopped by him [in the exercise of ordinary care] in time to prevent a collision. (*Id.*)

25. The judge charged the jury that "a party claiming to have been injured by the neglect of another must fail in his action, unless it appear that he was free from any negligence, without which the injury would not have happened. The greatest negligence on the part of the defendants will not cure the defect of its *least* negligence on the part of the plaintiff." Also, that if they "should believe, on the whole evidence," that if the plaintiff by looking up the street, before attempting to cross it, would have seen the car in time to have saved himself from this collision, then his not so looking was negligence on his part, contributing to the injury, which precluded his recovery in this action. *Held* that the charge was more favorable to the defendants than they had a right to ask. (*Id.*)

26. Where the evidence, as to negligence on the part of the plaintiff as well as of the defendant, is conflicting and is fully and fairly submitted to the jury, their finding upon such evidence should not be disturbed. (*Id.*)

27. Even if any one has a right to use his own premises as a hospital for his diseased horses, he has not the right to permit such horses, when afflicted with a contagious disease, to go at large in the highway, or to water them at a public tank used for watering the sound horses of other persons. (*Mills agt. The New York and Harlem Railroad Co., 2 Robt. 326.*)

28. The right of an individual to place a large number of sickly and diseased horses upon his own premises, although in immediate contiguity with a neighbor's stables containing his horses, is

all that such individual can claim, and it is the only concession the law makes. In the exercise of that right, he is bound to use due diligence to see that his neighbor is not injured by his negligence. (*Id.*)

29. The owner of diseased horses, knowing their disorder to be contagious, is bound to exercise all the care that a prudent man would exercise, or a rightful regard for the interest of others requires, such as placing his diseased horses so remote from a partition between his stable and that of a neighbor, as to render contact with his neighbor's horses impossible. (*Id.*)

29. Railroad corporations, at crossings, by ringing no bell, blowing no whistle, giving no signal. (*Renwick agt. N. Y. Central Railroad Co., 36 N. Y. R. 132.*)

30. The letting down of the chains which guard the passage from a ferry boat to the bridge, by one of the servants of the ferry company, before the boat is properly secured to the bridge, is an act of negligence which will render the company liable for damages sustained in consequence thereof. (*Ferris agt. Union Ferry Co., 36 N. Y. R. 312.*)

30. The letting down of such chain by the servant having that duty in charge is an assurance to the passengers that the boat is properly secured to the bridge, and that the passageway is safe for exit. (*Id.*)

31. One digging a hole in a public street, and leaving the same open and unprotected or unguarded, is liable for injuries to others, arising from his negligence. (*Bliss agt. Schaub, 48 Barb. 339.*)

NEW YORK HARBOR.

1. The notice required by the act of 1860, (*Laws of 1860, ch. 522, § 2.*) to be given by the board of commissioners of pilots to persons erecting structures beyond the exterior line defined by the commissioners for the preservation of New York harbor, must be a notice from the board itself; and should show on its face that it is such a notice. (*The Board of Commissioners of Pilots agt. Vanderbilt, 2 Robt. 367.*)

2. A notice given by the president of the board, in pursuance of verbal authority from the board, merely signed "R. Sturges, president," with nothing on its face to show that it emanated from the board, will be deemed the act of an individual, and will not subject the person upon whom it is served to the pen-

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salty mentioned in the statute for continuing a structure after notice. (*Id.*)

NEW YORK, (STATE OF,)

1. The grant to the state of New York, by the third article of the compact or treaty between that state and the state of New Jersey, made in 1833, of exclusive jurisdiction over all the waters of the bay of New York, and all the waters of the Hudson river, and of and over the lands covered by said waters, to low water mark on the New Jersey shore, subject to the right of property therein granted to New Jersey, conferred upon the state of New York full power and authority to preserve the river and bay from injury by encroachments from strangers acting without authority. (*The People agt. The Central Railroad of New Jersey*, 48 Barb. 478.)
2. The jurisdiction given to the state of New York, by that article, is not the mere right to serve process either civil or criminal, but is the jurisdiction granted by one sovereign power to another; and in that sense it means the right of exercising authority—of governing and controlling. (*Id.*)
3. The exclusive jurisdiction in the state of New York, over the waters of the Hudson river, and over the land under the water, gives a right of property therein, sufficient to maintain an action for an encroachment thereon, by erecting docks and piers connected with the main land; notwithstanding the fee of a portion of the land is vested in the state of New Jersey. (*Id.*)
4. The boundaries of the state of New York extend to low water mark on the New Jersey shore; and the county of New York, on its western boundary extends to the west bounds of the state. (*Id.*)

NUISANCE.

1. A bawdy house is a public nuisance, but it cannot be lawfully abated by a mob. (*Ely agt. The Board of Supervisors of Niagara County*, 36 N. Y. R. 297.)

OFFICER.

1. If, through the neglect of the proper officer, a person is prevented from redeeming land sold for taxes, no title will pass by his deed, &c. (*Van Beurghen agt. Sawyer*, 36 N. Y. R. 150.)

2. Public officer is an agent or servant of the government, &c. (*The People of the State of New York agt. Vilas*, 36 N. Y. R. 459.)
3. Note given to induce a violation of duty void as against public policy. (*Devlin agt. Brady*, 36 N. Y. R. 531.)
4. When an officer becomes satisfied that there was a want of jurisdiction in the court issuing the process, he is not bound to act under it, and if sued for a neglect of duty, he may set up the invalidity of the process as a defense, even though he has already collected a portion of the amount specified therein, and made a return thereof. (*Tucker agt. Malloy*, 48 Barb. 85.)
5. He has a right, under such circumstances, to suspend action at any time, and his return of a partial collection of the execution does not create an estoppel. (*Id.*)

OPINION OF THE COURT

1. The opinion expressed by the court at general term that there must be judgment for the defendant, constitutes no part of the record, but is only a form of denying the motion for a new trial. (*Van Bergen agt. Bradley*, 36 N. Y. R. 316.)

ORDERS.

1. An order extending time to answer, supersedes a prior motion noticed to strike out portions of the complaint, where there is no reservation in the order of the right to make such motion. (*Marry agt. James*, ante 238.)

PARTITION.

1. A parol partition of real estate by tenants in common, followed by exclusive possession are acts of ownership by each tenant respectively, and are valid and binding by their heirs. (*Wood agt. Fleet*, 36 N. Y. R. 499.)
2. The doctrine of partition by and between tenants in common, discussed by DAVIES, Ch. J. (*Id.*)

PARTNERS AND PARTNERSHIPS.

1. Where the articles of a copartnership prescribed a specified period of its continuance, no one of the partners can, by any purely voluntary act or acts done by him, work its dissolution. (*Ferrero agt. Buhlmeyer*, ante, 33.)

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2. Such acts may be sufficient to authorize a *court of equity* to decree dissolution on the application of the other partners; and that court may on the application of even the party committing such acts, notwithstanding such commission by him, decree a dissolution, if there are other causes justifying it, and it would be for the benefit of the partnership itself. (*Id.*)
3. A purely voluntary *assignment* made by a partner, of his share and interest in a partnership, limited to continue for a specified period, does not of itself dissolve the partnership, nor furnish a cause for which a court of equity will, on the application of the assignor, or of the assignee, decree a dissolution against the consent of the other partners. (*Id.*)
4. But an assignment made *bona fide*, by such partner in failing circumstances, to secure or pay debts due by him, is not to be regarded as a purely voluntary one within this rule. (*Id.*)
5. The powers of partners in reference to dissolution of partnerships, fully discussed. (*Id.*)
6. The mere fact that a check, paid out by a member of a firm, is in the name of the firm, is not sufficient notice to the parties receiving it that it is partnership property; nor enough to put them on inquiry before crediting the amount to the private account of the partner of whom they receive it. (*Sterling agt. Jaudon*, 48 *Barb.* 459.)
7. The plaintiffs, a mercantile firm doing business at Havana, entered into an agreement with a firm who were merchants at New York, by which the former were to purchase sugars and ship them from Havana on joint account, consigned to the latter at New York, and to pay for the same by drafts drawn upon the consignees, on said consignments, and negotiated in Havana: *Held* that the relation of the parties to the agreement was clearly that of partners, in the purchase and sale of sugars. (*Davis agt. Grove*, 2 *Robt.* 134.)
8. *Held*, also, that the interest of each partner, in the assets and stock of the partnership was subject to the lien of the other partners for payment made by them beyond their share of the debts of the company, and was applicable to the payment of debts not paid, before any division of the partnership property. (*Id.*)
9. *Held*, further, that an assignment by the New York firm of all their real and personal property in trust for the benefit of their creditors, only carried that residuary interest; and the assignee had no right, by virtue, thereof, to appropriate the whole partnership assets, of the two firms to the payment of the separate debts of such New York house, and might be restrained by injunction. (*Id.*)
10. Such a cause of action might be joined with one for a partnership accounting. (*Id.*)
11. Where a partnership has been dissolved by the personal insolvency of some of the members, and their attempt to misappropriate the assets of the partnership to their private debts, the other partners will be entitled to a receiver. (*Id.*)
12. Such receivership should extend to all the partnership assets in the hands of the defendants. The injunction order should include them, so as to prevent the defendants from misappropriating them; and they should be required to deliver them over to the receiver. (*Id.*)
13. An agreement between two firms, one doing business at Cuba and the other at New York, by which the former were to buy merchandise at the former place and ship it to the latter at New York and to pay for the same, so far as they could, by bills drawn by the Cuba firm on the New York house to be by them accepted, constitutes the members of both firms partners as to any transactions under such agreement. (*Davis agt. Grove*, 2 *Robt.* 635.)
14. Any merchandise shipped under such agreement from Cuba, as well as the proceeds of any so shipped which might be in the hands of the New York house, were the joint property of such partnership, and the members of the Cuba firm had a right to have the same first applied in satisfaction of any joint indebtedness thereof, including any bills drawn by them to pay for such merchandise, before the same could be employed to satisfy any debts due by the New York house alone, or of any individual member of either firm. (*Id.*)
15. An assignment by the New York house, under such circumstances, of merchandise shipped under such agreement, and the proceeds of any so shipped, to an assignee for the benefit of the creditors generally of such firm, is fraudulent and void, as against the members of the Cuba firm, and may be set aside in an action brought by them to wind up the affairs of such partnership and apply its property to pay its

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debts, in which they are entitled to an order of injunction and receiver. (*Id.*)

PAYMENT.

1. The taking up a note by a bank to protect itself from the consequences of indorsing it, "good," by mistake, is not a payment of the note. (*Irving Bank agt. Wetherald*, 36 N. Y. R. 335.)

PERJURY.

1. It is unnecessary in an indictment for perjury, to specify the particular form in which the oath was administered. (*Tuttle agt. The People*, 36 N. Y. R. 431.)
2. It is sufficient to allege the substantial and specific facts constituting the offense, without setting forth the evidence establishing their truth. (*Id.*)
3. Where the existence of a corrupt intent is material, it is proper to prove the antecedent acts and declarations of the accused in connection with the *res gestae*. (*Id.*)
4. Where a party, from corrupt motives, erased the signature of the subscribing witness to a deed, and procured the instrument to be recorded by falsely swearing that he was himself the subscribing witness; *held*, that he was properly convicted of perjury. (*Id.*)
5. In such a case, it is no defense that the accused acted upon the advice of counsel in taking the oath, if the jury are satisfied from the evidence that he acted in bad faith, and sought the advice as a mere cover to secure immunity against the penalty of his crime. (*Id.*)

PILOTS AND PORT PILOTAGE.

1. The state laws regulating port pilotage are not superseded by the act of Congress, prescribing pilot regulations for steam vessels navigating the high seas. (*Cisco agt. Roberts*, 36 N. Y. R. 292.)
2. In the absence of federal legislation, the states have a right to protect their commerce, by exercising, on the neighboring seas, the power accorded for that purpose to every maritime people. (*Id.*)
3. Pilots, licensed for the port of New York, by state authority, are entitled to off-shore pilotage, when they comply with the regulations prescribed, by tendering their services at sea to vessels about to enter that port. (*Id.*)

PLEADINGS.

1. The supreme court has the same authority to amend the statement and confession of judgment as it has in relieving against defaults and slips in practice. (*Union Bank agt. Bush*, 36 N. Y. R. 631.)
2. A party is not estopped or concluded by a mistaken averment of the law in its pleadings. The rule applicable to matters of fact is not applicable to matters of law; for such averments are uncalled for, and do not tend to mislead the opposite party. (*Id.*)
3. Under the Code of Procedure, the plaintiff may unite in the same complaint a claim to recover the possession of real property, and also a claim for damages for withholding the same. (*Vandevoort agt. Gould*, 36 N. Y. R. 639.)
4. Under such claim, the question for the jury in respect to damage, is: How much is the plaintiff damaged up to the day of the trial? (*Id.*)

POSSESSION OF PERSONAL PROPERTY.

1. In an action for the recovery of possession of personal property, where the defendant restores the possession to the plaintiff before the actual commencement of the action, and the plaintiff objects to the manner in which the property is returned by the defendant, as being injurious to him, but, nevertheless, accepts the possession, the action cannot be maintained. (*Christie agt. Corbett, ante*, 19.)
2. It is error in such a case to let the cause go to the jury; the court should grant a *non suit*, or direct the jury to find a verdict for the defendant. (*Id.*)

POWER OF TRUST.

1. A power to an executor to sell real estate, "as she shall deem expedient and for the best interests" of certain legatees named, is a general power in trust, in which the executor has no interest. Such a power is not well executed by the conveyance to one of the legatees of a portion of the real estate of the testator, in payment of a debt due from the testator to the legatee. (*Russell agt. Russell*, 36 N. Y. R. 581.)
2. The debts are to be discharged by means of the personal estate, and real estate can only be applied for that purpose upon an order of the surrogate,

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after the personal estate is exhausted. (*Id.*)

3. A sale authorized by these terms must be one in which judgment and discretion are exercised, and which the trustee believes to be for the interest of the legatee. A conveyance in discharge of a debt does not comply with these requisites. (*Id.*)

PRACTICE.

1. The death of one of the plaintiffs, and the substitution of his successor in interest, pending a reference of the action, does not operate to supersede the order of reference or invalidate the prior proceedings. The plaintiffs, in such a case, are entitled to the benefit of the prior proceedings already had in the action, including the order of reference, when such order has been duly entered, whether by consent of the parties or upon motion, in actions which are referable without such consent. (*Moore agt. Hamilton*, 48 Barb. 120.)
2. Where, in an action to recover a sum claimed by the plaintiff to be due to him, on the ground of an omitted credit, the defendant simply interposes the defenses of a general denial, and payment, and, under the issues thus framed, the parties have investigated the whole case on the trial, without objection, the defendant cannot afterwards be allowed to say it is not a case, upon the *pleadings*, for examining the question of fraud or mistake. (*Hutchinson agt. The Market Bank of Troy*, 48 Barb. 302.)
3. Where, upon a trial at the circuit, the judge, after submitting questions of fact to the jury, directs that the exceptions be heard in the first instance at the general term, on the hearing at general term the court has nothing to do with the findings of fact; and even though erroneous, it cannot interfere to correct them. (*Dickerson agt. Wason*, 48 Barb. 412.)
4. The judge at the circuit cannot direct a case to be reviewed and heard at the general term in the first instance, if there are questions of fact to be examined, so far as relates to such questions. (*Id.*)
5. Where the judge submitted several questions to the jury, although he told them there was no conflict of evidence in the case, and gave as a reason why he could not decide the case as a matter of law, that it was the province of the jury not only to determine as to the credibility of witnesses, where there was a conflict of evidence, but to determine the weight of circumstances as evidence; it was held, that such a rule, if there was no conflict of evidence to call in question the credibility of witnesses, or to pass upon the weight of testimony, was clearly erroneous. (*Id.*)
6. Where a corporation is the defendant, the plaintiff cannot have an order for the examination of the defendant as a witness, by its president and secretary. (*Goodyear agt. The Phoenix Rubber Company*, 48 Barb. 522.)
7. The 390th and 391st sections of the Code refer to the examination of parties, not of the agents, officers or servants of parties to a suit. It was not the intention of the legislature to authorize the examination of a corporation as a witness. (*Id.*)
8. In an action for an accounting, it is premature to take the examination of witnesses until it is decided that the plaintiff is entitled to an accounting. (*Id.*)
9. An action commenced in the supreme court, by one foreign corporation against another, cannot be removed for trial into the circuit court of the United States, under the act of congress of 1789. (*Ayres agt. The Western Railroad Corporation*, 48 Barb. 132.)
10. But where the assignee of a foreign corporation, suing another foreign corporation, is a citizen of this state, the action may be removed, provided the claim is of such a nature that the United States court can take cognizance of it. (*Id.*)
11. Section 236 of the Code does not authorize the examination of a person who, on being applied to by the sheriff, does not refuse to give the certificate therein mentioned, but gives the only certificate that he can give, viz., that the defendant in the attachment suit has an interest, as a special partner, in his firm, the amount of which will depend on the liquidation of the affairs of the affairs of the partnership. (*Reynolds agt. Fisher*, 48 Barb. 146.)
12. That section allows an examination only when the party applied to by the sheriff refuses to give the certificate. (*Id.*)
13. Motions for a new trial on the ground of *surprise* are addressed very much to the sound discretion of the court, and if it satisfactorily appear that, to promote the ends of justice, an opportunity should be presented for the introduction of new testimony, the court will

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- furnish it by setting aside the verdict and granting a new trial. (*Tyler agt. Hoornbeck*, 48 Barb. 197.)
14. Where the alleged surprise consisted in calling one of the defendants as a witness for the plaintiff, in violation of a promise claimed to have been made by the plaintiff's attorney to the defendant's attorney, by reason of which the latter was unprepared to impeach the witness, as he would have been had such promise not been made: *Held*, that the discretion of the court was properly exercised in granting a new trial, on terms. (*Id.*)
15. The practice of granting new trials at special term by a different judge from the one who heard the cause at the circuit, for legal error on the trial, condemned. (*Per LEONARD, J.*) (*More agt. Bennett*, 48 Barb. 229.)
16. It is sufficient that the charge of a judge is in substantial accordance with the request, though he declines to adopt the particular language proposed. (*Fay agt. O'Neill*, 36 N. Y. R. 11.)
17. When the testimony offered can in no event become material to the questions at issue, its rejection is proper, irrespective of the grounds upon which it was rejected. (*People agt. Brandreth*, 36 N. Y. R. 191.)
18. It is important to state the true grounds of an objection only in cases where it is possible to obviate the difficulty on trial. (*Id.*)
19. In an action upon a bond given to release a vessel taken on a warrant issued against such vessel, under the act to provide for the collection of demands against ships and vessels, passed April 24, 1862, it is not necessary for the plaintiff to prove the regularity of his proceedings prior to the giving of the bond. (*Onderdonk agt. Voorhis*, 36 N. Y. R. 358.)
20. The voluntary giving of the bond by the defendants, is *prima facie* evidence of the due issuing of the warrant under which the vessel was seized. (*Id.*)
21. The due execution of the bond being admitted or proved, the *onus* is upon the defendant to impeach its validity or force. (*Id.*)
22. Where the complaint alleges facts as the basis of the cause of action which assume the legal transfer of the property to the defendant, the plaintiff cannot, on trial, treat the transfer as tortious, and claim to recover as for a wrongful conversion of such property. (*Lewis agt. Mott*, 36 N. Y. R. 395.)
22. In the action upon an undertaking on an appeal, where the complaint alleges that the undertaking was executed by the defendants, and there is no denial thereof in the answer, it is a sufficient allegation of such fact, and also sufficient evidence of the complete execution and delivery of the instrument. (*Robert agt. Good*, 56 N. Y. R. 408.)
23. Under such circumstances, the admission in evidence of a copy undertaking being erroneous, it does not amount to a prejudicial error, because no such proof was required of the plaintiff, as it stood admitted in the pleadings. (*Id.*)
24. When at the trial the only defect in the evidence available to the defendant, is that which relates to the affirmance of a judgment by an appellate court, it is competent to supply that defect by proper evidence on hearing the appeal before the appellate court. (*Id.*)
25. Under the Code of Procedure the complaint may embrace both legal and equitable causes of action; the legal causes may be tried by a jury and the equitable causes by the court. (*Davis agt. Morris*, 36 N. Y. R. 569.)
26. The erroneous decision, by the court, on motion of the plaintiff, that the defendant is not entitled to a jury because the complaint sets up only equitable causes of action, works no waiver by the plaintiff of any legal causes of action therein contained; and failing to establish any equitable cause, he may recover upon any legal cause of action which he may have established as contained in his complaint. (*Id.*)

PRINCIPAL AND AGENT.

1. An agent or broker cannot maintain an action against a *telegraph company*, for damages arising from an error or mistake made by the company in transmitting a message from his principal to him, where he acts under the message in the name of and for his principal. (*Rose agt. U. S. Telegraph Co.* *ante*, 308.)
2. An agent, while in the employ of his principal, has no right to abuse the confidence reposed in him, to his own advantage, or to the injury of his principal. If employed to sell goods, he cannot himself become the purchaser. (*McDonald agt. Lord*, 2 Robt. 7.)
3. A merchant who has employed a person as clerk and salesman, for a stated period, has a right to rescind the contract and discharge him, when such em-

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- ployer that such clerk, being interested as partner in another firm engaged in the same business, persists in selling the goods of such employer to such firm, on credit, contrary to orders. (*Id.*)
4. An agent with express authority to sell, has no implied authority to warrant where the property is of a description not usually sold with warranty. (*Smith agt. Tracy*, 36 N. Y. R. 79.)
 5. One employed to make a sale of bank stock is not, presumptively, empowered to warrant it in the name of his principal. (*Id.*)
 6. The receipt of the proceeds by the owner of the stock, in ignorance of an unauthorized warranty by the agent, is not a ratification of the unauthorized engagement. (*Id.*)
 7. When a party claims, receives and retains the property of another, knowing that it was obtained by an unauthorized use of his name, it is a ratification of the assumed agency which evinces his assent to the original contract. (*Id.*)
 8. So, too, when an agent, acting within the scope of his actual authority, perpetrates a fraud for the benefit of his principal, and the latter receives the fruits of it, he thereby adopts the fraudulent acts of the agent. (*Id.*)
 9. But the mere receipt by the owner of the proceeds of his own property is not a ratification of a collateral contract, made without his authority, and to which he never knowingly assented. (*Id.*)
 10. An agent, under a general authority to purchase, cannot buy from himself without the knowledge or assent of his principal. (*Conkey agt. Bond*, 36 N. Y. R. 427.)
 11. Such a transaction is a breach of duty, and the contract is subject to rescission, irrespective of any question of intentional fraud or actual injury. (*Id.*)

PRINCIPAL AND FACTOR.

1. A commission merchant who detains from his principal the proceeds of property received from him for sale, cannot justify the wrong by alleging that, as between his principal and a third party, the latter is equitably entitled to such proceeds. (*Aubrey agt. Fiske*, 36 N. Y. R. 47.)
2. On an agreement that factors are to sell on a commission of six per cent. to customers denominated *first class*, and are to guarantee all sales, and when they sell to customers denominated *second class*, they are to be entitled to additional commissions equal to the difference between the prices charged to first and second class customers; held, that it was their duty as factors to render to their principals true accounts of the prices obtained from both first and second class customers. (*Boston Carpet Co. agt. Journeay*, 36 N. Y. R. 384.)
3. That when they had sold as to second class customers and had rendered to their principals accounts as sold to *first class*, their principals were entitled to recover the amount for which the sales were made, as to *first class*, without allowing for sales as to *second class*. (*Id.*)

PRINCIPAL AND SURETY.

1. Where an action is brought by the state against the *sureties of a bank*, for the payment of moneys of the state deposited by a states prison inspector in the bank, the bank cannot set off a claim for moneys loaned the inspector, to be used for state purposes, where it appears that the inspector had no authority whatever to borrow money upon the credit of the state. (*People agt. Brandreth*, ante, 171.)
2. An action was brought and judgment recovered against F. and B. jointly, on a promissory note of which F. was accommodation maker and B. indorser. F. paid the judgment, so far as it was against himself, and took an assignment of it so far as it was against B. The interest of B. and his wife in certain real estate was converted into personalty by a judicial sale in a partition suit, and the proceeds were paid into court. B. subsequently assigned his property to H. in trust for the benefit of his creditors. F. commenced an action against B., for moneys paid for him at his request, procured an attachment, under which he attempted to levy upon his interest in the fund, by notice to the city chamberlain, obtained a judgment and issued execution. He then, upon petition, without notice to B. or his wife, obtained an order of reference as to the claims on such fund, and their priorities. Held, that all the relations of principal and surety were not necessarily created by means of a contract drawn in such a form as the promissory note above mentioned, and a question might arise whether the maker of a note, although an accommodation one, was necessarily entitled to be subrogated to the rights of a creditor who had obtained a judgment against the indorser

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of such note, for whose accommodation it was made ; and that therefore the court, as the custodian of the fund, ought not to part with it, unless and until some one was heard on behalf of B. and his wife, or waived the right, by their authority. (McCUNN, J. dissented.) (*Ballard agt. Burruas*, 2 Robt. 206.)

3. *Held, also,* that the order of reference did not confer on the referee jurisdiction to accept any waiver of B.'s rights from H., his assignee for the benefit of creditors. That he was confined to reporting upon those judgments only which were liens on the fund. It would be improper for the court to part with the fund without some formal stipulation, waiver or release, binding on such assignee, on the record. (*Id.*)
5. *Held, further,* that unless F.'s claim could be sustained under the attachment, and H., the assignee, waived his priority, the court would not be justified in ordering the interest of B. in the fund to be paid over, without notice to him in some way recognized by law, or his appearance. (*Id.*)

PROMISSORY NOTES.

1. Where there is no limitation or restriction as to the manner in which an accommodation note is to be used, the payee has a right to apply it to the payment or security of an antecedent debt, or to sustain his credit in any other way. (*Cole agt. Saubaugh*, 48 Barb. 104.)
2. Where an indorser, though denying notice of protest, in a sworn answer, fails to annex the affidavit required by statute (3 R. S. 5th ed. 474, § 35), a notarial certificate of protest may be received in evidence, and is presumptive evidence of the facts stated therein. (*Gawtry agt. Deane*, 48 Barb. 148.)
3. But the defendant may contradict the presumption arising from the certificate, by showing that it is untrue. (*Id.*)
4. Where the demand of payment is not made by the notary himself, but his certificate is founded on an entry made by his clerk, the act of the clerk is not to be deemed the act of the notary, but may be proven as the act of an individual, and is subject to the ordinary rules of evidence. (*Id.*)
5. Where the clerk who made the demand and gave notice to the indorsers, in the name of the notary, is dead, memoranda made by him and entered in the register of the notary, are admissible in evidence to prove demand and notice. (*Id.*)
6. If there has been no due presentment

of a note, or notice of dishonor, and the indorser, after the maturity of the note, supposing himself liable to pay the same, takes security from the maker, that will not amount to a waiver of the objection of want of due presentment and notice. (*Id.*)

7. An admission of liability by an indorser, after maturity, is never held to be sufficient to overcome the want of demand and notice, without proof that, at the time of the admission, the indorser knew that there was such defective protest. (*Id.*)
8. In the absence of any such proof, although such an admission is not sufficient to establish the liability of the indorser, it is admissible as evidence, in connection with the other proof, to be submitted to the jury upon the question of notice. (*Id.*)
9. A promissory note or bill, to come within the rules for the protection of the holders of mercantile paper, must be payable absolutely at some future period, not depending on a contingency, nor payable out of a particular fund. (*Skinner agt. Richmond*, 48 Barb. 428.)
10. An instrument was drawn in the usual form of a promissory note, except the following clause, viz.: "Payable out of and from my separate property and estate, with interest payable quarterly." *Held,* that the instrument was not affected by any of the above rules; the words used not referring to a particular fund, but to the whole estate of the maker. Individual promises are always payable from the separate estate of the maker. (*Id.*)
11. *Held, also,* that whether the instrument was subject to the rules of law governing mercantile paper, or not, evidence to show an agreement, contemporaneous with the making or indorsement of the instrument, to extend the time of payment, was not admissible, in an action by the holder against the maker and indorser. (*SUTHERLAND, J. dissented.*) (*Id.*)
12. Neither a promissory note, nor any other agreement in writing, can be varied or impaired by parol evidence. (*Id.*)
13. To allow one not a party to a note to recover it, or the value of it, from the payee, would be an anomaly in law. The maker of a note, or any one liable upon it, might maintain such an action, upon proper proof. But to allow a recovery, in such an action, on the ground that the promise contained in the note was to the plaintiff, or to one under

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whom he claimed title to it, would be a violation of the maxim that written contracts cannot be contradicted by parol evidence. (*Per GILBERT, J.*) (*Fulton agt. Fulton*, 48 Barb. 581.)

14. In an action upon a promissory note, a referee, to whom all the facts were referred, found as facts that the note was given in consideration of the discontinuance of a former action by F., the maker, the payment of costs therein, and an agreement to execute and deliver a satisfaction piece of a judgment obtained in that action; and that no such satisfaction piece was given before the commencement of the present action. But it appeared in evidence that a consent to discontinue the former action was executed by the plaintiff's attorney. Held, that the consideration for the agreement on the part of the defendants, when the note was given, did not consist wholly of the giving of the satisfaction piece, but included the discontinuance of the suit; and that the suit having been discontinued, the consideration for the note did not wholly fail, so as to let in the defense of a failure of consideration; the defendants having had substantially all the benefit of a discharge of the action, except the removal of a mere apparent lien of the judgment on their real estate. (*Bellows agt. Folsom*, 2 Robt. 138.)

15. Although a notary may have sent a notice to an indorser, properly addressed, by the proper channel of communication, it does not follow that he can testify that the indorser actually received the notice. (*Ward agt. Waterhouse*, 2 Robt. 633.)

16. By statute, the certificate of a notary is only made presumptive evidence of some of the facts therein stated, as to presentment and other matters affecting negotiable instruments. The presumption ceases, as to the receipt of notice by the defendant, when he positively denies in his answer that he ever received one. (*Id.*)

17. A note given to procure an officer to violate his official duty is against public policy, and void in the hands of the original payee or any subsequent holder thereof with knowledge of its character. (*Devlin agt. Brady*, 36 N. Y. R. 531.)

18. When a party to such note by indorsement, having knowledge of its character, procures the same to be discounted, and after its dishonor takes it up, he is remitted only to his original rights upon the same. By such transaction he

does not acquire the rights of a bona fide purchaser. (*Id.*)

PUBLIC OFFICERS.

1. Where an action is brought against public officers (Board of Health) to restrain them by injunction from doing a threatened or anticipated act, alleged to be injurious to the plaintiff—the plaintiff neither claiming to recover damages, nor asking for relief, either by reason of acts done or omitted, it does not come within the statute allowing *double costs*, where the defendants succeed in the action. (*Affirming decision S. C. at Special Term*, 33 Hrc. 3, and concurring in Judge INGRAHAM's views on this point. (*Stewart agt. Schultz*, ante, 31.)
2. The statute giving *double costs*, when adopted, applied exclusively to actions and proceedings in courts of law, and not to suits in equity; consequently it is not applicable to actions of purely equitable cognizance. (*Id.*)

PURCHASER.

1. One who purchases under a judgment of foreclosure thereby submits himself to the jurisdiction of the court; and he may be compelled, on motion, to comply with the conditions of sale. (*Cazet agt. Hubbell*, 36 N. Y. R. 677.)
2. When the purchaser is in possession, under a decree which has not been fully executed, mere lapse of time is no answer to a motion to compel the payment of the amount of his bid. (*Id.*)
3. When a motion is made, by those having an interest in the fund, that the money be paid into court, it constitutes no valid objection that one of the original parties is dead, and that the action has not since been revived. (*Id.*)

QUARANTINE.

1. The commissioners of quarantine will be restrained by injunction from taking, carrying on or continuing any proceedings to acquire title to a tract of land selected by them as a site for a landing and boarding station, and from taking possession thereof, where the facts in the case are such as to justify and sustain the inference that the large tract of land was not bona fide selected only as a site for a landing and boarding station, but with a view to other purposes. (*Town of Gravesend agt. Curtis*, ante, 261.)

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RAILROADS.

1. In subscribing for stock of a railroad company under the statute, there must be both a subscription and a payment of money—ten per cent., to make a binding contract; but these acts need not be simultaneous, the statute being satisfied, and the contract of subscription complete by a subsequent actual payment or receipt of the money. And the subscription cannot depend for its validity or invalidity, upon the fact whether the statute has been complied with in the payment of the ten per cent, willingly or unwillingly, by the subscriber. (*Ogdensburg Railroad Co.* agt. *Wolley*, ante, 54.)
2. If the directors of the company do not exact the money, and the subscriber omits to pay at the time of subscribing, it is the doctrine of former cases in this court that the contract remains incomplete, and of no binding force. If, however, the money be subsequently paid, the statute is complied with. (*Id.*)
3. It seems, that as an original question, a subscription for stock under this statute, without the payment of any money, would be valid and binding on the subscriber. (*Id.*)
4. In an action for negligence against a railroad company, where there is considerable evidence given on both sides as to whether or not the defendant's bell was rung before coming to the crossing where the collision occurred, it is not a case for a non-suit, but the question should be submitted to the jury. (*Renwick* agt. *N. Y. Central Railroad Co.* ante, 91.)
5. Although if the plaintiff had stopped his carriage at a point nearer the track he might have seen the train, and avoided the danger, his not doing so is not necessarily negligence. (*Ernst* agt. *Hudson River Railroad Co.*, 32 How. 61.) (*Id.*)
6. In an action against a railroad company for negligence, in causing injuries and death where there is a conflict of evidence upon the facts, and the jury, by their verdict, adopt the view claimed by one of the parties, the appellate court will take the same view on the appeal. (*Sheridan* agt. *Brooklyn Railroad Co.* ante, 217.)
7. It does not alter the liability of the defendants that the wrong of a third party concurred with their own in producing the injury. (*Id.*)
8. A horse railroad company is guilty of negligence in not stopping their car when the strap attached thereto is pulled for that purpose to let off a passenger. (*Id.*)
9. Where it was claimed by the defendants that the deceased passenger, a lad nine years of age, was in fault in going on to the front platform of the car, and was knocked off the car while in motion, by another passenger, and that none of the defendants' servants contributed to the act.
10. Held, that the jury having found that it was the very act of the conductor in placing the lad upon the front platform, in order to make room inside the car for other passengers, which produced the result, the defendants could not escape liability, although the lad was thrown off by another passenger in getting off while the car was in motion. (*Id.*)
11. Ordinary capacity and ordinary care and attention in protecting themselves as passengers on a railroad, is all the law requires. This each is bound to give whatever his age or condition, and if he fails, he cannot call upon others to supply his deficiencies, or to compensate him for losses arising from its absence. (*Id.*)
12. Under the general railroad act (2 R. S. 681), if a railroad company, in the construction of its road, find it necessary to change the channel of a stream, and thus divert its course, and for that purpose construct a new channel, the company is bound to keep such new channel in a suitable and proper condition, so as not only to restore but preserve the stream in its former state of usefulness, as near as practicable. (*Cott* agt. *Lewiston Railroad Co.* ante, 222.)
13. In an action against a railroad company to recover damages for injuries arising from negligence, where from the evidence there is no doubt of the negligence of the party injured contributing to the injury, the plaintiff should be non-suited. (*Burke* agt. *Broadway and Seventh Avenue Railroad Co.* ante, 239.)
14. And this rule applies to an action brought on behalf of a child six years of age, who sustains the injury. (*Id.*)
15. "It was equally necessary for the plaintiff to establish the proposition that he himself was without negligence and without fault. This is a stern and unbending rule, which has been settled by a long series of adjudged cases, which we cannot overrule if we would." (*Per Gridley, J. Spencer*

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agt. Utica and Schenectady Railroad Co. 5 Barb. 337. (*Id.*)

16. When this case was before this court on a former appeal (34 N. Y. R. 30), the reversal of the judgment was put on the express ground that the supreme court committed an error in holding that Ketchum's directorship in the company barred the claim of the firm of which he was a member. No new facts were elicited on the re-trial to change the case; consequently the rule of *stare decisis*, if of any value, should be adhered to in this case, when the precise question is again presented in the same court, between the same parties, and upon substantially the same facts. (*New York and New Haven Railroad Co. agt. Ketchum*, ante, 302.)
17. When it appears that a passenger is riding upon a railroad car in a place of hazard or danger, his negligence is *prima facie*, proved, and the *onus* is upon him to rebut the presumption. (*Clark agt. Eighth Avenue Railroad Co.* ante, 315.)
18. Where a passenger showed that the inside of the city railroad car was full, and that the platform was full, so that no more persons could stand thereon; that in this situation the car was stopped for him to get on; that while riding there the conductor called upon him and received his fare:
19. *Held*, that under such a state of facts, negligence could not be fairly imputed to the passenger for riding in that position. (*Id.*)
20. The law requires of those engaged in the carrying of passengers, the exercise of such care on their part and of their servants, as will insure the safe carriage of their passengers, so far as their safety depends upon the diligence and care of those engaged in such carriage. (*Id.*)
21. If the negligence of the carrier contributes to the injury of the passenger, it is no defense to the carrier, that the negligent act of another (a third person), contributed thereto, if the injury would not have occurred but for the negligence of the carrier. (*Id.*)
22. On the 11th of December, 1852, the common council of the city of New York granted to P. and others the perpetual right to build and run a railroad through the Second avenue, for the transportation of passengers. On the 15th of December, 1852, an agreement, pursuant to the resolutions of the common council, was entered into between the city and the grantees, by which

the latter accepted the grant, and, for themselves and "their successors" agreed that they would fulfill and keep the stipulations, conditions, &c. On the 12th of January, 1853, a company called the "Second Avenue Railroad Company," was incorporated under the general railroad act, the directors in which were all the grantees named in the license, and four other persons. And by an instrument dated January 25, 1853, and signed by all the grantees but one (M.) they assigned the grant to the said railroad company, for the consideration of \$200,000, no part of which was ever paid. The company was organized with the expectation that the grant was to be transferred to it, and the assignment was executed pursuant to the plans of the promoters of the company. In an action by the assignee of the grantees, against the railroad company to recover the consideration agreed to be paid by the latter, for the transfer: *Held*, 1. That the principle that trustees, directors and others, acting in a trust relation, cannot make valid contracts with themselves, affecting the trust estate, was applicable to such assignment. 2. That it was not in the power of the owners of the grant from the city, after having formed themselves into a corporation, and having held out the idea that the corporation owned the right to the road—to name the price for the transfer of the grant from themselves to the company, and to vote as directors of the corporation, to themselves as owners of the grant, the whole capital stock, for the privilege obtained from the city. 3. That the same reasons which prevented the directors of the railroad company from fixing their own value upon the grant, operated to preclude them from making any acknowledgments by resolution signed by their secretary and entered in their minutes, which would have the effect to take the case out of the statute of limitations. 4. That the fact of the grant having been assigned by an instrument under seal, had no bearing upon the question of the statute of limitations; the action not being brought upon the assignment, or for the breach of any agreement under seal, but to recover the price of property conveyed at an agreed or implied valuation. And that more than six years having elapsed, since the sale, the statute was a conclusive bar. (*Coleman agt. The Second Avenue Railroad Co.* 48 Barb. 371.)

23. On a motion for a nonsuit all the contested facts, with all the inferences that the jury may properly draw from them,

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- are to be held in favor of the plaintiff. (*Sheridan agt. Brooklyn City and New-town Railroad Co.* 36 N. Y. R. 39.)
24. When the deceased was compelled by the conductor of the defendants to stand upon the platform of a crowded car, and, while there, was thrown from the car by the hasty and careless departure of another passenger; held, that the wrongful act of such passenger did not relieve the defendants from the consequences of their wrongful act in placing the deceased on the platform, but they were responsible for the damages sustained by him. (*Id.*)
25. A refusal to charge, "that the fact that the deceased was a child, makes no difference in the application of the rule of law as to the question of negligence; if not of years of discretion he should have a protector," is not erroneous, where the court charged generally, "that if the jury were of opinion that the lad was negligent in any way, and his negligence contributed to the injury, the plaintiff could not recover; but if there was no negligence on the part of the boy, and there was on the part of the company, then he could recover. (*Id.*)
26. Ordinary capacity and ordinary care and attention in protecting himself is all that the law requires of a passenger in a railroad car. (*Id.*)
27. A sick or aged person or a child is entitled to more care from a railroad company than one in good health and under no disability. He is entitled to more time in which to get on or off the cars, and to more consideration when crossing a street. (*Id.*)
28. If from a train of cars approaching a crossing, no signal is given, either by ringing the bell or sounding the whistle, the defendant's railroad company is chargeable with negligence. (*Renwick agt. New York Central Railroad Company,* 36 N. Y. R. 132.)
29. A plaintiff approaching the crossing, and stopping from four to six rods therefrom to look and listen, and neither seeing or hearing a signal of an approaching train, is not to be deemed guilty of such negligence as to justify a nonsuit. (*Id.*)
30. Negative testimony may have the force and effect of positive testimony. (*Id.*)
31. It seems, that when it appears that a passenger is riding upon the platform of a car in a place of danger, his negligence is *prima facie* established, and the onus is upon him to rebut the presumption. (*Clark agt Eighth Avenue Railroad Co.* 36 N. Y. R. 136.)
32. But on showing the car and platform to be full of passengers, with no room for more; and that the conductor call for and receive the fare from such passenger, the presumption is rebutted. (*Id.*)
33. Such fact warrants the jury in finding that the plaintiff had been invited by those having charge of the car to ride in that place, and that an implied assurance had been given that it was a suitable and safe place to ride. (*Id.*)
34. A railroad company, which, in the construction of its road, necessarily diverts a stream of water from its natural channel, is bound to restore and preserve the stream in its former state of usefulness as nearly as practicable, in respect to the owners of real property on such stream. (*Cott agt. Lewiston Railroad Co.* 36 N. Y. R. 214.)
35. To restore such stream to a proprietor burdened with the expense of preserving it, would not be a compliance with the requirements of the statute in such respect. (*Id.*)

RECEIVER.

1. An order appointing a receiver of a judgment debtor, in an action brought by a creditor, will not vest in such receiver the title to any part of the income of a fund bequeathed by a testator, whereof the income was to be paid to such debtor, accruing after the date of his appointment. (*Graff agt. Bennett,* 2 Robt. 54.)
2. A complaint, in an action by the receiver against the executors of such testator, which does not state that the defendants, at the time of the plaintiff's appointment as receiver, had money, property or effects in their hands belonging to the legatee, is bad on demurrer. (*Id.*)
3. Any accumulation of income in the hands of the executors, beyond what is necessary for the support of the legatee, may, under a proper complaint, be reached by a creditor; but the income cannot be anticipated. (*Id.*)
4. Independent of the act of the legislature of 1858, chapter 514, authorizing receivers to treat as void all acts done in fraud of creditors, and making the parties liable to the receivers for the same receivers of corporations have authority to sue for all moneys due to

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the company, and for all property improperly disposed of in violation of the rights of either creditors or stockholders, for the purpose of paying the debts and dividing the surplus, if any, among the stockholders. (*Osgood agt. Layton 48 Barb* 463.)

5. An action may be maintained by the receivers of an insolvent corporation against individuals, some of whom are stockholders and some of whom are creditors of the company, to recover from the stockholders a dividend declared on its capital stock and received by them; where it is averred in the complaint that such dividend impaired the capital; that some of the defendants, as creditors, are suing the stockholders to recover from them such dividends; and that the funds so misappropriated are required to pay the debts of the corporation. (*Id.*)

REDEMPTION OF LAND SOLD FOR TAXES.

1. What neglect of the officer will prevent the passing of the title to the purchaser. (*Van Benthuyzen agt. Sawyer, 36 N. Y. R.* 150.)

REDUNDANCY.

1. It is not the duty of the court to reform or redraw a pleading on the ground of redundancy. If obnoxious to that objection, the redundant matter should be so clearly pointed out by the party, in his notice of motion, that the court may put its finger upon it. (*Bryant agt. Bryant, 2 Robt.* 612.)
2. Defenses in an answer will not be stricken out for redundancy, unless they are obnoxious to that charge by their verboseness and repetitiousness. (*Maretzke agt. Cauldwell, 2 Robt.* 715.)

REFEREES AND REPORTS.

1. While the report of a referee will not, as a general rule, be disturbed, if there is evidence which may be said fairly to sustain it, even though there is apparently a strong array against it, it will not be upheld where the evidence on which it professes to be founded not only comes far short of sustaining, but in some of its aspects is at war with its conclusions, and where that on the other side is not only numerically, but intrinsically overwhelming. (*Strittmacher agt. Salina Plank-round Co. ante,* 74.)

2. The report of the referee in this case considered to be an extraordinary one to be made by a sensible man and a good lawyer. (*Id.*)

3. Where judgment has been entered in favor of the plaintiff on a report of a referee, and the defendant thereupon immediately appeals therefrom to the general term, and serves the necessary papers upon such appeal; and after service of the notice of the appeal, the defendant moves at special term, and procures an order referring the case back to the referee, to amend his report in a particular manner specified in the order, or otherwise, as he might think correct, and staying all proceedings in the action on the part of the plaintiff until the referee should amend his report, and giving the defendant thirty days after service of a copy of the amended report to make a case and exceptions, and staying all proceedings on the judgment until the decision of the general term on the appeal; and before the service of the order to amend upon the referee, he died:

4. Held, that the death of the referee was a misfortune the defendant must bear; and it followed that he must suffer all the consequences resulting from it. That the plaintiff was entitled to an order vacating the defendant's order to amend, &c., but the defendant was entitled to go on with his appeal from the judgment, and to have time to make a case and exceptions, with a stay. (*Juliand agt. Grant, ante,* 132.)

5. The practice which prevailed before the Code, of moving for judgment, as in case of nonsuit, for not bringing the case to trial, on showing that later issues upon the calendar had been tried, is still continued under the present revision of the rules, by rule 27. (*Kimberly agt. Parker, ante,* 275.)

6. But this practice, as well as the rule referred to, govern the disposition of only such causes as may be noticed and placed upon the calendar for trial at the circuit. It is entirely unadapted to causes that have been referred. (*Id.*)

7. Before the revision of the rules of 1847, the only mode in which the defendant could dispose of an action which had been referred, was to apply to the court, by special motion, for leave to notice and bring on the trial of the cause himself; and if such leave was given, to notice the cause for trial, and obtain a report against the plaintiff. The substantial advantages secured by this practice to the defendant have been preserved and continued by the Code,

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- by conferring upon him the right to notice and bring on the trial before the referee, without any special leave of the court. (*Id.*)
8. By the revision of the rules of 1847, rule 43 allows the defendant, without procuring leave to notice and bring on the hearing himself, to give notice to the plaintiff, requiring him to bring the cause to trial within forty days; and if he fails to do so, the defendant is at liberty, upon showing these facts, to move for judgment, as in case of nonsuit. (*Id.*)
9. There is nothing in the authority conferred by the Code upon the defendant, to notice the cause for trial himself, that is inconsistent with the continuance of this practice under rule 43. Both may exist together, without any real or apparent conflict whatever. (*Id.*)
10. Therefore, under the state of practice provided for by the Code, allowing the defendant to notice the cause and bring on the trial, the previous practice, providing for motions for judgment as in case of nonsuit, are still available in actions that have been referred. (*Id.*)
11. But the defendant cannot move for judgment as in case of nonsuit, under the 43d rule, without first giving the notice requiring the plaintiff to bring on the trial of the action, as that rule prescribes. That notice, as well as the plaintiff's default in complying with it, are indispensably necessary to entitle the defendant to judgment, as in case of nonsuit, where the action has been referred. (*Id.*)
12. A motion for judgment as in case of nonsuit cannot be made by a single defendant, under section 274 of the Code, as that section provides only for those cases where there are *several defendants*, and the plaintiff has unreasonably neglected to serve the summons on some or one of them, or to proceed in the cause against the defendant or defendants who may have been served. (*Id.*)
13. A referee has the power to adjudge that a party examined before him is guilty of a contempt. (*Heerdt agt. Wetmore*, 2 Robt. 697.)
14. Although the court retains its inherent original power, *concurrently* with a referee, to punish for a contempt of court, in a matter pending before him, he ought first to pass upon the question of contempt, even if he reports his facts, conclusions and other necessary matters to the court, in order that the attachment may issue from it. (*Per Moncrief; J.*) (*Id.*)
15. A referee, having heard testimony, in an action committed to him to hear and determine, it is his duty to render a decision. Until some determination has been made by him, the court cannot review his proceedings. (*Id.*)
16. Where a witness, at the time of a direction to produce books, is not in a condition to comply with it, and no reasonable time, or any time, is allowed within which he is to do so; but the order is in the present tense and absolute "to produce a bank book and a check book," without any prior notice of the necessity *then* to produce them; and he has not been summoned to produce them, and swears he cannot at that time and place produce them before the referee; he cannot be punished for a contempt in not producing the books. (*Id.*)
17. It is highly improper for counsel to interrupt the orderly proceedings of a court of justice by instructing a witness not to answer questions. The right to refuse to answer resides with the witness alone, and its exercise is at his personal peril. (*Id.*)
18. For such conduct, if not overlooked or excused, as not an intentional contempt of court, it is the duty and within the power of the referee to adjudge such counsel to be guilty of disorderly or contemptuous behavior, to issue an attachment and commit him. (*Id.*)
19. The authority to punish for such misconduct pertains solely and exclusively to the court in which it occurs in its immediate view and presence, and cannot be delegated to a judge of this court. (*Id.*)
20. Section 273 of the Code, as amended in April, 1862, which provides that (unless the court shall otherwise order) a referee shall make and deliver his report within sixty days from the time the action shall be finally submitted, in default of which he shall not be entitled to any fees, and the action shall proceed as though no reference had been ordered, does not cover existing submissions. (*Trist agt. Cabezas*, 2 Robt. 708.)
21. It contemplates future submissions—final submissions to the referee *after* the amendment was passed, and took effect upon them also, and was not intended to have a retro-active effect. (*Id.*)
22. In an action to foreclose a mortgage, the defendants claimed, in their answer, that the mortgage was given to secure subsequent advances or liabilities.

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tion, and that on the transactions arising therefrom the plaintiff owed the defendants a sum of money, for which the defendants had brought an action in another court. A reply to such answer merely denied any counter-claim. The defendants moved for a reference to take an account, before the trial. The plaintiff opposed the motion by an affidavit setting up an account stated. Held, that, as the case was one in which the fact of the settlement could be tried by a referee, under section 254 of the Code, it was proper it should be so tried. (*Carr agt. Weirman*, 2 Barb. 663.)

22. A reference to ascertain amount due is proper. (*Chamberlain agt. Dempsey*, 36 N. Y. R. 144.)

RELEASE.

1. A release discharging a party from "all claims and demands, on account of our late co-partnership," &c., is not a bar to an action by the releasor, against the releasee, to recover back a sum of money alleged to have been paid by mistake, on a sale by the latter to the former of his interest in the co-partnership. (*Rodgers agt. Pack*, 48 Barb. 92.)

RELIGIOUS SOCIETIES.

1. The section of the statute relative to religious corporations, which provides that no board of trustees shall be competent to transact any business, "unless the rector, if there be one, and at least one of the church wardens, and a majority of the vestrymen, be present; and each rector, if there be one, and if not, then the church wardens present, or if both the church wardens be present, then the church warden who shall be called to the chair" shall preside at every such meeting or board, and have the casting vote" (I. B. & 4th ed. 1179, § 1, 2 w/ 15A ad. 604), does not mean that the chairman shall have the casting vote only in a tie arising upon the votes of members. (*The People ex rel. The Rector, &c., of the Atonement*, 48 Barb. 61.)

2. The term "casting vote," as used in that section, is to be construed as authorizing the chairman, after having first voted with the rest, upon a tie occurring, to give a second vote. (*Id.*)

3. Where, at a meeting of a vestry, both wardens and eight vestrymen being present, and the senior warden in the chair, five voted in favor of engaging

the rector as rector, and five, including the presiding officer, in the negative, whereupon the chairman declared the resolution to be lost: Held, that the chairman must be deemed to have given the casting vote, his declaration that the vote was lost being equivalent to that; that upon the vote taken, the resolution to call the rector failed for lack of a majority of the votes, and if the chairman voted twice, it was lost, by reason of a majority voting against him. (*Id.*)

4. A religious society incorporated under the general act of 1813 (April 5) is a corporation of all the members of such society, and not of the trustees, or a limited portion of the members. (*Grum agt. Prussia, etc. Society*, 36 N. Y. R. 161.)
5. The trustees of such society cannot take a trust for the sole benefit of members of the church, as distinguished from other members of such congregation. (*Id.*)
6. Nor does such statutory incorporation contemplate or recognize the devotion of the corporate property to the support of a perpetual and unchangeable system of religious faith and doctrine. (*Id.*)
7. A majority of the corporators, without respect to their religious tenets, have the entire control over the revenues of the corporation. (*Id.*)

REMOVAL OF CAUSES TO U. S. COURTS.

1. The plaintiff is entitled to notice of the application by the defendant for the removal of an action from the state courts into the circuit court of the United States, under section 12 of the judiciary act of 1789. (*Bruel agt. Chapman*, ante, 140.)
2. Prior to the service of the notice of application, the defendant, if *sans*, must cause his appearance to be entered, and file his petition in the proper clerk's office, in the county named in the complaint as the place of trial. (*Id.*)
3. Where the defendant, before service of notice of retainer, appeared in open court, at a special term, held in another district, and after entering his appearance in the minutes of the court, presented his petition for the removal of action into the circuit court of the United States, and obtained an order for such removal:
4. Held, that the order was irregular and

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void, for want of authority to make it. (*Id.*)

REVENUE STAMPS.

1. The act of congress, passed in 1864, entitled "An act to provide internal revenue for the support of the government," was intended to impose a stamp duty upon writs and other process issued by a justice of the peace, when the amount claimed is one hundred dollars, or over. It therefore embraces a summons. (*Cole agt. Bell* 48 Barb. 194.)
2. Where the notice of appeal from a judgment of a justice of the peace, though specifying several grounds of error, did not specify the want of a stamp upon the summons as one of them: *Held* that as the objection involved a question of jurisdiction, it was not waived by the notice of appeal, but could be raised at any time during the progress of the action. (*Id.*)
3. No objection can be urged on the argument of the appeal, to the notice of appeal, because no revenue stamp was put upon it. Such objection can only arise on a motion to dismiss the appeal. (*Id.*)
4. A receipt, such as is usually given by express companies for goods delivered to them to be carried by express, is not an agreement within the meaning of the stamp act, requiring a stamp of five cents. (*DeBarre agt. Livingston*, 48 Barb. 511.)
5. It is a receipt for the property to be transported, and contains only a notice of the terms on which the company is willing to undertake the transportation. (*Id.*)
6. Such receipt is not subject to any stamp duty, but is excepted in the act of congress of 1865. (*Id.*)
7. Whether congress has the power to declare a contract void for the want of the proper stamp? *Quera*. (*Id.*)
8. An alleged contract was evidenced by a letter, from the defendant to the plaintiff, dated June 18th, and the plaintiff's answer thereto, dated June 20th. The latter, when transmitted, was not stamped, but a copy in the plaintiff's letter book was stamped, and the plaintiff testified that he stamped the defendant's letter of the 18th, on the day after its receipt, and canceled both of the stamps: *Held* that in the absence of any pretense that the defendant ever stamped his letter, or proof that he ever saw the stamp after it was affixed, or assented to the stamp- ing, or the cancellation, this was not such a stamping as the act of congress requires; and consequently the paper was void. (*Myers agt. Smith*, 48 Barb. 614.)
9. The person executing the document which requires a stamp is the one to affix it; and in any event it cannot be affixed, nor the cancellation be made, by another party, without the actual knowledge and express or implied assent of the party who issues the paper on which the stamp is placed. (*Id.*)
10. *Held*, also, that the subsequent appearance of the plaintiff before the United States collector, excusing the omission and procuring him to stamp the letters and cancel the stamps, and to sign his certificate to that effect, did not remedy the difficulty in respect to the want of a stamp. (*Id.*)
11. The person who is to appear before the collector and procure the stamping and cancellation is the person who is sued the paper and who should have affixed the stamp. He it is upon whom the penalty of \$50 is imposed by section 158 of the act of congress; and he can only be relieved by appearing and making the application and securing the indemnity. (*Id.*)
12. If a party having an interest in a paper shall desire it to be thus stamped for his benefit, he can only effect it by procuring the maker or party to be affected it to appear before the collector and procure the stamping and cancellation. (*Id.*)

REVERSION.

1. In an action by a vendor to recover damage for the removal of a building standing upon premises sold under executory contract, while the premises were in the possession of the vendee, it is competent for the defendants to prove that the plaintiff had no title to the premises in question at the time of making the contract or at any time afterwards, and no power or means of procuring such title. (*Smith agt. Babcock*, 36 N. Y. R. 167.)
2. The instances considered in which a party may deny the title of his vendor. (*Id.*)
3. Where the persons against whom the action was brought has made no contract, but are trespassers simply the idea of estoppel or of privies is inapplicable. They are liable to the real owner for an injury to the reversion, and in an action against them for such

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damages, may show that the plaintiff is not such owner. (*Id.*)

RIVERS.

1. Where the legislature has asserted for the state the right to control a particular river, and has expressly declared it to be a public highway, by a public act, the state has the unquestionable right to control the use of the river, and to prevent the erection of any bridges or dams, or other works, which will obstruct the free use of the same as a public highway. (*The People agt. Gutchess*, 48 Barb. 656.)
2. Whatever rights the public have, in such a river, the authorities of the state are bound to protect, and a suit for that purpose is properly instituted by the attorney general, in the name of the people. (*Id.*)
3. The public right in a river, upon the assumption that it is not navigable, in fact, is to be regarded simply as that of passage, as in a highway. (*Id.*)
4. By declaring a stream a highway, the state does not acquire any title to the bed of the stream, or any higher or other right than it possesses in, or over ordinary highways upon the land. (*Id.*)
5. If the state owns the bed of a river, or if it be a navigable river, in fact, then the law laid down in *The People agt. The Canal Appraisers* (33 N. Y. R. 461,) and *The Canal Appraisers agt. The People ex rel. Tibbets*, (17 Wend. 571,) applies to it, and no one can lawfully construct a bridge over it, without the consent of the legislature. (*Id.*)
6. The state government, in this particular, is the guardian of the rights of each and every citizen, which rights consist in an absolute and unqualified privilege, without let or hindrance, at all times freely to navigate any and every of the streams in the state, that is, at any season of the year, or at any stage of water therein, capable of navigation; and particularly so, if the legislature has by special act declared such stream a public highway. (*Id.*)
7. Held, in this case that, though the defendants, commissioners of highways, could not be permanently restrained from erecting a bridge over the Seneca river, as a free bridge, provided it could be constructed in such a manner as not to interfere with the free navigation of said river, if it should turn out upon the trial that the said river is not navigable, in fact, and that the state does not own the bed of the stream; yet

that inasmuch as it was asserted on the part of the people that such river was a public navigable river, of the width of thirty-five rods, and of the average depth of eleven feet, and that the state owned the bed of the stream; and it appeared that the existing bridges across the river had been constructed under leave or authority from the legislature; the court ought, in behalf of the public interest, rather to assume that the state had the rights it claimed, till the truth could be otherwise established. An injunction was accordingly granted, to restrain the erection of the proposed bridge, until the hearing. (*Id.*)

SALE.

1. There is no such disability in the cashier of a bank purchasing real estate at a public sale in his own name, but in fact for the benefit of the bank, as there is in the case of trustees with regard to the lands of their beneficiaries. Such a transaction in the former case would not avoid the sale, while in the latter it would. (*White agt. Lester, ante*, 136.)
2. Where both of the commissioners, under the statute of 1837, are present at and make the sale of the mortgaged premises, and the entry thereof in their book of minutes is made by only one of them, it is not a fatal irregularity. Besides, there is nothing in the law which requires this entry to be signed by the commissioners. (*Id.*)
3. Where the plaintiff succeeds to the title of the mortgagor of the premises, and suffers the mortgage to become foreclosed by operation of law, by his delinquency in paying the amount due by the terms of the mortgage, it is equivalent to a foreclosure pronounced by a decree of a court, and nothing remains in the plaintiff but the special privilege of redemption. He has no right which can be prosecuted by action of ejectment against the purchaser in possession under the sale. (*Id.*)
4. A sale of goods "to arrive," is a mere executory contract, conditional on their arrival, and not a transfer of title; and the purchaser may reject a partial and insist upon a full performance of the contract. If less than the amount contracted for arrives, he is not bound to accept that as a performance. (*Reimers agt. Ridner*, 2 Robt. 11.)
5. The plaintiffs sold to the defendants a certain number (733) of bags of crude saltpetre, at a specified price (15 cents) per pound, cash in bond, to arrive on board a certain ship, (*Arabella*), with-

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out guaranty as to quality, or time of arrival of the ship. The ship arrived with part (340) bags of the saltpetre in an unsound and unmerchantable condition. The plaintiffs tendered the portion in a sound condition (393 bags) to the defendants, who refused to accept or pay for the same: *Held* that a tender of less than the whole quantity of saltpetre sold, did not satisfy the requirements of the contract, and the defendants were not bound to accept it. (*Id.*)

6. The question whether a sale of property was made with the intent to hinder, delay or defraud creditors, is a question of fact for the jury, and not a question of law. (*Topping* agt. *Lynch*, 2 *Rcbt.* 484.)
7. Whether there was an actual and continued change of possession of the property sold, is a question of fact for the jury; and if there is no such change of possession, the presumption of law is that the sale was fraudulent and void. (*Id.*)
8. The words "actual and continued," in the statute of frauds, are applied to the change of possession. They mean an open, public change of possession which is to continue and be manifested continually by outward and visible signs, such as render it evident that the possession of the judgment debtor has ceased. He must cease from his apparent as well as real ownership. (*Id.*)
9. It is erroneous for the judge to charge that the circumstances proved show a change of possession, and a continued change of possession; or that the payment of money to the alleged purchaser, on account of the proceeds of sales of the goods, is sufficient evidence that the property was in the possession of such purchaser, and remained in his possession. (*Id.*)

SEDUCTION.

1. Where the defendant, under a promise of marriage, seduced the plaintiff's minor daughter, finally accomplishing her ruin by force in a house to which he had lured her by false pretenses; after which the intercourse between them continued and she became pregnant by him, but neither made any complaint to her parents of the outrage, or disclosed her condition, and they allowed her to absent herself from home at night, without excuse or inquiry: *Held* that although it was a proper case for holding the defendant to bail, in action for seduction, such

circumstances should mitigate the amount of bail. (*Kahn* agt. *Freytag*, 2 *Robt.* 678.)

SECURITY.

1. Where collateral security for the payment of a note is given to the payee or holder thereof by the maker, and authority is given to sell such collaterals if the note is not paid at maturity, and, on failure to pay the note, the collaterals are sold, the purchaser thereof does not stand in the relation of pledgee, nor is there any privity between the pledgor and such purchaser. (*Lewis* agt. *Mott*, 36 *N. Y. R.* 395.)
2. Where a valid claim has been embraced in a subsequent security, which is invalid, as being made upon usurious considerations, such valid claim is not thereby rendered void, or in any way discharged. But the owner thereof is restored to his rights under the original. (*Cook* agt. *Barnes*, 36 *N. Y. R.* 520.)

SEPARATE ESTATE.

1. When services are rendered for a married woman by her procurement, on the credit and for the benefit of her separate estate, there is an *implied* agreement and obligation, springing from the nature of the consideration, which the courts will enforce by charging the amount on her property as an equitable lien. (*Owen* agt. *Cawley*, 36 *N. Y. R.* 600.)
2. Where a charge is created by her own *express* agreement, for a good consideration, though for a purpose not beneficial to her estate, or even for the sole benefit of her husband, she is bound in equity by the obligation she thus deliberately chooses to assume. (*Id.*)
3. A married woman is at liberty to avail herself of the agency of her husband, as if they had not been united in marriage. (*Id.*)

SET OFF.

1. Where an action is brought by the state against the *sureties of a bank*, for the payment of moneys of the state deposited by a state prison inspector in the bank, the bank cannot set off a claim for moneys loaned the inspector, to be used for state purposes, where it appears that the inspector had no authority whatever to borrow money upon the credit of the state. (*People* agt. *Brandreth*, *ante*, 171.)

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2. Although, on a mere motion to set off judgments, courts can protect their officers, by refusing to set them off, so as to defeat an attorney's lien for his costs, yet the statute respecting set-offs overrides the lien of an attorney in an action. (*DeFiganiere agt. Young*, 2 Robt. 670.)
3. An attorney who does not take an assignment of costs to accrue in an action, before their recovery, cannot avail himself of the statutes of set-off, which are confined to cases of contract reduced to judgment, and do not reach costs or damages on a contract or for a tort not yet reduced to judgment. (*Id.*)
4. Judgments cannot be set off against each other, where one of them has been appealed from, and the appeal is still pending and undetermined. (*Id.*)
- judgment, and set it forth in his answer (*Id.*)
5. A sheriff is not allowed to allege error in the judgment or process, as an excuse for an escape, where the process is regular upon its face. (*Bensel agt. Lynch*, 2 Robt. 418.)
6. Where a defendant is arrested by the sheriff, upon an order of arrest, and does not give bail, and no deposit is made instead thereof, the sheriff becomes liable to the same extent as if he were himself bail, or had made a deposit of the amount required. (*Id.*)
7. And if the defendant does not appear when process is issued against his person, the sheriff, as bail, is liable to the plaintiff for the amount of the judgment, without regard to the insolvency of the defendant in the execution. (*Id.*)

SHAREHOLDER.

1. A shareholder who has been assessed upon the value of his shares in a bank or banking association, pursuant to the act of 1866 (ch. 761), is not entitled to a reduction by the assessor of valuation, on account of his debts. (*People ex rel. Cagger agt. Dolan*, 36 N. Y. R. 59.)
2. The legislature, by the said act of 1866, did not intend to change the policy before pursued by the state in taxing bank capital. (*Id.*)

SHERIFF.

1. In an action against a sheriff, for taking and converting the property of the plaintiff, it is not necessary to aver in the complaint that the property taken was exempt from execution. (*Dennis agt. Snell, ante*, 467.)
2. The proof of such fact on the trial can only become necessary to meet a defense, and can then be given in evidence without being pleaded. (*Id.*)
3. Where, however, the complaint contains an averment that the property is exempt from execution, the defendant is not compelled to set up in his answer the non-exemption of the property, or be excluded from proving it on the trial, merely because it is averred in the complaint. It is an immaterial allegation, which it is not necessary to deny. (*Id.*)
4. If the sheriff relies entirely upon the execution in taking property, it is sufficient for him merely to set forth the writ; but if he desires to go beyond the execution, and inquire into the consideration of the judgment upon which the execution is issued, he must plead the

8. Hence, in an action against the sheriff to enforce that liability, after an execution against the body of the judgment debtor has been returned *non est*, evidence of the insolvency of the judgment debtor is immaterial, and should be rejected. (*Id.*)

SHIFTING USE.

1. If the person primarily designated dies during a trust term lawfully constituted in respect to its duration, the statute permits the use to be shifted to some other object of the testator's bounty; and it is not necessary that such person should be in existence at the time of creating the trust. (*Harrison agt. Harrison*, 36 N. Y. R. 543.)
2. Future contingent limitations of real estate in favor of unascertained persons, especially the issue to be born of a son or daughter of the testator, are not prohibited by the statute. (*Id.*)
3. A devise in trust for the use of testator's children during their natural lives, and, on the death of his wife, or the death of any child leaving issue, the trustees to apply the share of the income to which such deceased parent or child was entitled to the use of the surviving child during minority, and the share absolutely on the child's attaining full age: But if such child die without leaving lawful issue surviving, or if such issue die under age, such share to revert to and become a part of the residuary estate: *Held*, that the ulterior limitation over was void. *Held*, that said ulterior limitations could be dropped, and the primary disposition of the estate be allowed to stand. (*Id.*)

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4. It is no objection that the limitations, as well those which are good as the one alleged to be bad, are embraced in a single trust. Such trust created for two purposes—one lawful and the other unlawful—is good for the lawful purpose, though void as to the unlawful one. (*Id.*)
5. The case of *Amory agt. Lord* (5 *Seld.* 403) considered and distinguished. (*Per Davies, Ch. J.*) (*Id.*)

SHIPS AND VESSELS.

1. In an action against the owners of a ship, for goods furnished to the ship, on the order of the captain, the plaintiff must give some proof to show that the articles furnished were necessaries. (*Ford agt. Crocker*, 48 *Barb.* 142.)
2. The rule adopted in the courts of this country, while it admits the right to confine the supplies thus furnished to such as are necessary, leaves the decision as to what is necessary rather to the captain than to the creditor. (*Id.*)
3. Tradesmen are not called upon, before delivering supplies for a vessel on the order of the captain, to examine whether each article ordered is actually necessary to enable the vessel to make the voyage. If it is proper that they should be ordered on account of, and for the use of, the vessel, the vendors may rely on the captain to decide whether they are necessary or not; and his order for the goods on that account is sufficient. (*Id.*)
4. In the absence of any proof that any part of the plaintiff's account was furnished for the private use of the captain, evidence that the supplies were ordered by the captain for the use and on account of the vessel, and that they were furnished, is *prima facie* sufficient to charge the owners. (*Id.*)
5. A bottomry bond is valid although it includes the personal liability of the master. (*Kelly agt. Cushing*, 48 *Barb.* 269.)
6. The master is personally liable on the bond, in such a case, for the debt secured; but not unless the vessel arrives. (*Id.*)
7. The master may bind the freight, as well as the vessel, in such a bond, by express stipulation; but in the absence of such a stipulation, the bond will create no lien on the freight, directly. (*Id.*)
8. Where the money secured by the bottomry bond is not paid, the lender, on proof of the insufficiency of the vessel as security, and that the pecuniary re-

sponsibility of the master is doubtful, may have an injunction to restrain the owners of the vessel from collecting the freight of the cargo brought by the vessel on her homeward voyage. (*Id.*)

9. The master of a vessel has a lien on the cargo and freight, for advances made, or liabilities incurred, by him in a foreign port, for the repairs and supplies of the vessel. (*Id.*)
10. And when the vessel is not of sufficient value to secure the debt, and the master is not responsible, the creditor is entitled to have this lien of the master enforced for the payment of the debt incurred for repairs. (*Clerke, J., dissented.*) (*Id.*)
11. Under the statute of April, 1862, relative to demands against ships or vessels, a lien for repairs continues for at least the time prescribed for filing the specification of such lien, mentioned in the statute, (12 days.) A secret departure of the vessel within that period will not displace the lien. (*Onderdonk agt. Voorhus*, 2 *Robt.* 24.)
12. A seizure by the claimant, within such time, of the vessel on attachment, for his lien under the statute, renders the filing of a specification unnecessary. (*Id.*)
13. The defendants agreed (orally) with certain part owners of a vessel, who were also ship's husbands of her, to settle all debts due from such vessel, including one due from such part owner to the plaintiff, in consideration of the transfer to them by such part owners of their interest in such vessel, their substitution as ship's husbands, and their being permitted to retain out of her earnings all advances which they might make to pay such debts; with commissions thereon, and the amount of any indebtedness due by such part owners to them: Held 1. That this agreement created such a promise by the defendants to pay the debts of such part owners to the plaintiff as would entitle him to commence an action thereon in his own name; and was directly within the ruling in *Lawrence agt. Fox*, (20 *N. Y. R.* 268.) 2. That the pledge of the vessel to the defendants to secure future advances, accompanied by an agreement to allow them to act as ship's husbands, and earn commissions, being pecuniarily beneficial to them, and a prejudice to the debtors, took the promise of the defendants to such debtors, from whom such consideration proceeded, out of the statute of frauds. (*Connor agt. Williams*, 2 *Robt.* 46.)

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SLANDER.

1. Where it is claimed, in an action for slander, that the explanatory matter which accompanied the slanderous words, so qualified them that the crime in question was not imputed, it must be shown that the explanation not only accompanied the words, but that they were sufficiently explicit to enable those who heard the same reasonably to understand to what the words uttered referred; and that the crime which the words, standing alone and taken in their natural and ordinary meaning, would impute, was not intended to be charged. (*Van Akin agt. Cader*, 48 *Barb.* 58.)
2. The party who utters words imputing to another crime, must be presumed to intend what the words naturally import; and it is but just to require that the explanation be made sufficiently definite to prevent an erroneous impression unfavorable to the party against whom the charge is made. (*Id.*)
3. When barred by a final judgment in an action for malicious prosecution. (*Rockwell agt. Brown*, 36 *N. Y. R.* 207.)

See LIBEL AND SLANDER.

SPECIAL PROCEEDINGS.

1. The proceeding under the Revised Laws of 1813 (ch. 86) to determine what compensation shall be made as damages for taking lands to be laid out for squares, avenues and streets in the city of New York is a special proceeding under the Code of Procedure. (*King agt. Mayor, etc. of New York*, 36 *N. Y. R.* 182.)

SPECIAL JURY.

1. When, and under what circumstances, a special jury will not be granted, in an action upon a policy of marine insurance. (*Walsh agt. The Sun Mutual Insurance Co.* 2 *Robt.* 646.)

SPECIFIC PERFORMANCE.

1. In suits for specific performance of contracts, the contract must be established by competent and satisfactory proof, which must be clear, definite and certain. (*Lobdell agt. Lobdell*, 36 *N. Y. R.* 327.)
2. When, in the court below, there has been evidence tending to the establishment of such contract, the sufficiency of the evidence to satisfy the mind of the

court as to the existence of the contract cannot be inquired into on appeal. (*Id.*)

3. Courts of equity will sometimes decree a specific performance in favor of the plaintiff, notwithstanding he may have failed to make out the case stated in his bill. (*Id.*)
4. A parol agreement between father and son, that, on condition the son will enter upon a certain tract of land and improve it, the father will make him a deed of the same, and in pursuance of such agreement the son enters upon the land and occupies and improves it, is sustained by a sufficient consideration, and is not within the statute of frauds. (*Id.*)
5. Where a covenant in a lease is so ambiguous and doubtful that it is difficult to ascertain its meaning, an action to compel its specific performance will not be maintained. (*Buckmaster agt. Thompson*, 36 *N. Y. R.* 558.)
6. A clause in a lease as follows: "And the party of the first part hereby agree, in case the parties of the second part shall then be tenants of the premises, to first offer the said property so demised for sale to and purchase by them for the sum of \$25,000," does not mean that the lessor agrees, so long as the lessees should be tenants of the premises, to offer them for sale to them for \$25,000. The promise is imperfect and incomplete. (*Id.*)

STARE DECISIS.

1. When this case was before this court on a former appeal (34 *N. Y. R.* 30), the reversal of the judgment was put on the express ground that the supreme court committed an error in holding that Ketchum's directorship in the company barred the claim of the firm of which he was a member. No new facts were elicited on the re-trial to change the case; consequently the rule of *stare decisis*, if of any value, should be adhered to in this case, when the precise question is again presented in the same court, between the same parties, and upon substantially the same facts. (*New York and New Haven Railroad Co. agt. Ketchum*, *ante*, 302.)

STATUTE OF LIMITATIONS.

1. A promise by the defendant, that if the plaintiff would suspend bringing an action upon the second note of the defendant, he would abide by the decision of the first action upon a similar note of the defendant, if it amounted to a

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promise to pay, was not sufficient to take the note out of the operation of the statute of limitations—not being in writing. (*Brookman agt. Metcalf, ante*, 429.)

2. Where the plaintiff, upon the faith of such promise by the defendant, delayed bringing an action upon the second note, until after the decision of the action upon the first note, and until after the statute of limitations had attached: *Held*, that the defendant, upon the doctrine of *equitable estoppel*, or *estoppel in pais*, was precluded from setting up the statute of limitations as a defense. (*Id.*)
3. Proceedings in equity, by legatees, for a distribution of an estate, instituted after the expiration of one year from the granting of letters, is barred by the statute of limitations in the same time as an action at law. (*Clark agt. Ford, ante*, 478.)
4. To a proceeding under section 375 of the Code, for the purpose of having the defendant adjudged to be bound by a prior judgment entered in the action, after service of process upon his former partner and co-defendant only, who allowed judgment to be entered for want of an answer, the statute of limitations cannot be set up as a defense, although it had run against the demand before the service of process upon the partner. (*Berlin agt. Hall*, 48 Barb. 442.)
5. A demand, barred by the statute of limitations before the adoption of the Code, could not be revived by a subsequent acknowledgment, unless contained in a writing signed by the party to be charged. (*McLaren agt. McMartin*, 36 N. Y. R. 87.)
6. The effect of partial payments is the same now that it was before the Code. They are not equivalent to an express promise, but furnish evidence from which, in ordinary cases, a promise to pay the residue of the claim may be inferred. (*Id.*)
7. The mere fact, however, of a partial payment by an executor or administrator, on a demand already barred at the death of the testator or intestate, is not sufficient to revive the demand against his estate. (*Id.*)
8. The statute commences to run against the claim of an attorney for professional services and for disbursements, whenever his services are so brought to an end that he could maintain an action for such services. (*Adams agt. Fort Plain Bank*, 36 N. Y. R. 255.)
9. Whenever a debtor is in default for

not paying money in pursuance of his contract, interest, at least, should be given by way of indemnity. (*Id.*)

STAY OF PROCEEDINGS.

1. A stay of proceedings affected by taking an appeal from a judgment, with the requisite security to procure such stay, operates to suspend proceedings supplementary to execution on the judgment. (*Cowdrey agt. Carpenter*, 2 Robt. 601.)
2. But the proceedings should not be dismissed on account of the stay. The creditor's lien acquired by them is not taken away, although its enforcement may be delayed. A dismissal by the judge should be reversed on appeal, as being, at least, not an equitable exercise of discretion. (*Id.*)
3. It seems, that the judge before whom such proceedings are pending has no power to dismiss them because of such stay. (*Id.*)
4. A stay of proceedings to enable a party to move for a special jury, should not be granted, except at the trial term, or by the justice assigned to hold that part of the trial term upon whose calendar the cause is placed. If a stay is granted by a different justice, it may be vacated, on application of the defendant. (*Walsh agt. The Sun Mutual Insurance Company*, 2 Robt. 646.)

STIPULATION.

1. Admissions made by attorneys in the stipulations, whether in writing or by parol, cannot be retracted on a subsequent trial, unless by leave of the court. (*Owen agt. Cawley* 36 N. Y. R. 600.)

STOCK

1. A loan of shares of stock, accompanied by a power of attorney to transfer such stock, for the special purpose of being used by the borrower in his business, will not authorize him to sell such substituted stock and assign his claim to the proceeds of such sale to a third person. The fact that the borrower is the husband of the lender, will make no difference, if the stock be her sole property. (*Deming agt. Bailey*, 2 Robt. 1.)
2. Any sale by the borrower, in such a case, of such substituted stock, which becomes the property of the lender, by being bought with her means and with

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her sanction, when made without the authority of the lender, become a wrongful conversion of it by him. But if she ratifies it, she will be entitled to the proceeds of the sale. (*Id.*)

STOCKHOLDERS.

1. A stockholder in an incorporated company, cannot be deprived of the right to inspect the books of the company, because they are kept in a *particular way*, or because they contain along with the information to which he is entitled, other information which he has no right to demand. (*People agt. Pacific Mail Steamship Company, ante*, 193.)
2. If a corporation does not keep the books which the statutes prescribe, it is its duty to permit an inspection of such as it does keep for the purpose of recording the transactions which the statutes give the stockholders the right to know. And such inspection may be enforced by *mandamus*. (*Id.*)
3. Proceedings to enforce the responsibility of the stockholders of a bank under the act of 1849, providing for winding up the affairs of the bank, are to be confined to stockholders; and the court is not to exercise jurisdiction over any who do not come within the definition of that term, as given in the second section of that act. (*Diven agt. Lee, ante*, 197.)
4. Where a judgment obtained under these proceedings, declared the defendant's testator to have been a stockholder in the bank, and directed the collection of the amount thereof, out of the assets in the hands of his executors, the defendants, when it appeared from the record itself that it had not been ascertained that the estate was chargeable, at the time the judgment was rendered —the report of the referee being that the executors individually were chargeable as stockholders; which report was ratified and confirmed by the court:
5. Held, that the court in rendering judgment against the estate, acted without authority, and the judgment was void for want of jurisdiction. (*Id.*)
6. When this case was before this court on a former appeal (34 N. Y. R. 30), the reversal of the judgment was put on the express ground that the supreme court committed an error in holding that Ketchum's directorship in the company barred the claim of the firm of which he was a member. No new facts were elicited on the re-trial to change the case; consequently the rule of *stare decisis*, if of any value, should be adhered to in this case, when the precise question is again presented in the same court, between the same parties, and upon substantially the same facts. (*New York and New Haven Railroad Co. agt. Ketchum, ante*, 302.)
7. Where the plaintiff, as stockholder of an incorporated company, brings an action against a portion of the directors of the company, including the president and vice president, for damages sustained by reason of the fraudulent over-issues of the stock of the company by the defendants; to be entitled to recover, he must prove satisfactorily to the jury that the certificates of stock bought by him did not represent genuine stock, or any part of the stock of the company, but constituted part of the over-issue not authorized by its charter. (*Bruff agt. Mali, ante*, 338.)
8. Then the burden is on the defendants to remove the inference deducible from these facts, by showing that the plaintiff's certificates were issued on the surrender, or on the transfer of genuine stock. This might be difficult, but, if so, or even actually impossible, the defendants should not be heard to complain, when their own admitted culpability creates the dilemma. (*Id.*)
9. Where it is established by competent evidence that the defendants have issued false certificates of stock of the company, authenticated by them as genuine, and thrown them upon the market with fraudulent intent, *they are liable to every holder* to whose hands they may come by fair purchase. In such case, the doctrine, which is undoubtedly true, that a vendor of property guilty of fraud on its sale, or who sells with a warranty, is liable only to his vendee, and a subsequent purchaser acquires no right of action therefor, does not apply. (*Id.*)
10. The manner of acquiring jurisdiction over the person of stockholders in proceedings to enforce the responsibility of stockholders under the act of 1849 (chap. 226) is to be confined strictly to stockholders, and cannot be applied to any one who does not come within the definition of that term given in the second section of the act. (*Diven agt. Lee, 36 N. Y. R. 302.*)
11. Where the executors have invested the funds of the estate in the purchase of bank stock without the authority of the testator or of the law, they do not thereby constitute the estate a stockholder in such bank. (*Id.*)

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12. In proceedings under such act to ascertain who are stockholders, and to determine their liability, it is essential that proof should be offered of the fact; or the fact should be ascertained as provided by the act, to enable the court to render judgment; and if the court attempt to dispense with such necessary evidence, and render judgment, its judgment will be void. (*Id.*)

STREETS.

1. In laying out a street, lands may be taken to be used for the purposes of court yards only by the owners of lots of which they form a part: and other premises may be assessed for the expense. (*Matter of Widening Bushwick Bushwick Avenue, Brooklyn*, 48 Barb. 9.)
2. The report of the commissioners, awarding damages for land taken will not be sent back for correction because of the inadequacy of the awards, unless it appears that there was an error in the principle upon which the commissioners proceeded in making the awards. (*Id.*)
3. Land may be taken for a street, adjoining its continuous line, to prevent angular pieces of property being left, when authorized by the legislature. (*Matter of Widening South Seventh Street, Brooklyn*, 48 Barb. 12.)
4. It is no objection to the report of commissioners of estimate, that one of the commissioners holds the legal estate in a portion of the premises taken for the street. (*Id.*)
5. It is not necessary for the common council of the city of Brooklyn to specifically direct the corporation counsel to move for the confirmation of the commissioners' report. It is his duty to take all necessary proceedings, by virtue of his office, when the common council have given him notice to carry out the improvements. (*Id.*)
6. The report of the commissioners awarding damages for land taken, will not be sent back for correction because of inadequacy of awards, unless it appears that there was an error in the principle upon which they proceeded, in making their awards. (*Id.*)
7. It is proper for the legislature to provide that in proceedings for opening and widening a street, the expenses incurred under a former act of the legislature for the same purpose be included as a part of the expense. (*Id.*)
8. The dedication of land, for the purposes of streets, binds the parties interested,

though made by commissioners appointed to make partition between the owners. (*The People ex rel. Sale agt. The City of Brooklyn*, 48 Barb. 211.)

9. And subsequent conveyances referring to such streets, and including the land to the centre of the street, will be held to convey the land in the street—not as unincumbered property, but as and for the purposes of public streets. (*Id.*)

STREAM OF WATER.

1. Diverted by railroad company, in the construction of its road, must be permanently restored. (*Colt agt. Lewiston Railroad Co.* 36 N. Y. R. 214.)

SUMMARY PROCEEDINGS.

1. The statute of 1849, in reference to appeals from proceedings before a justice of the peace to the county court, in summary proceedings, providing for a stay of the issuing of a warrant, pending the appeal, does not apply to proceedings instituted against a tenant solely on the ground that he is holding over after the expiration of his term. It is otherwise as to proceedings against the tenant in the other three classes of cases mentioned in the Revised Statutes. (*Sage agt. Harpending, ante*, 1.)
2. The appeal of itself in such case, does not stay the power of the justice to issue the warrant against the tenant to enforce his judgment. (*Id.*)
3. The fact that an appeal has been taken to another court, does not affect the conclusive nature of the judgment as a bar, while it remains unreversed. (*Id.*)
4. Where the landlord, the owner in fee of the demised premises, claims that the term of the tenant has expired, enters without process and without force, during the temporary absence of the tenant, he is justified in using so much force as is necessary to defend himself and maintain his possession of the premises. (*Id.*)

SUMMONS.

1. Where a summons is issued under the first subdivision of section 129 of the Code, demanding judgment for a sum certain, and the complaint states a cause of action arising upon contract, to recover unliquidated damages for the breach of a contract in the construction of a piece of machinery, the summons must control, and the complaint is irregular. (*Garrison agt. Carr, ante*, 187.)

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2. Where, in such case, the defendant, after service of the complaint, obtains an extension of time to answer, he waives the irregularity in the complaint. (*Id.*)

bis sureties were liable for the whole amount of his default. (*Id.*)

SUPPLEMENTARY PROCEEDINGS

1. Prior to the amendment of section 344 of the Code, in 1860, an appeal from an order of the county judge in *supplementary proceedings* would not lie in any cause originating in a justice's or county court. But under said amendment of that section, appeals now lie in such cases. (*Crouse agt. Whipple, ante*, 333.)
2. Supplementary proceedings are limited to reaching the property of the judgment debtor in his possession, or in the possession of another party, which are conceded to belong to the defendant. (*Id.*)
3. Where property is in the hands of others who make claim to it, the judge has not power to proceed and try the question of title. The proper course is for the judge to appoint a receiver, who may bring an action to try the claim of title. (*Id.*)

SUPREME COURT.

1. Jurisdiction over proceedings of highway commissioners on certiorari. (*Robinson agt. Ferris*, 36 N. Y. R. 218.)

SURETIES.

1. The sureties upon the bond of a public officer, are not discharged by the imposition upon their principal of new duties of a similar nature and character, by an act of the legislature. (*People agt. Vilas*, 36 N. Y. R. 459.)
2. The position of a public officer is that of an agent or servant of the government, rather than that of a contractor of the government. (*Id.*)
3. Where J. was, in 1850, appointed a commissioner for the county of St. Lawrence, to loan the moneys of the United States deposited with the state under the act of 1837, and the defendants became sureties for the faithful performance of his duties as such commissioner, and during the continuance of his office, the legislature transferred to such commissioner for the same purpose, moneys formerly held by another commissioner under the acts of 1792 and 1808, and J. became a defaulter, to the amount of \$500 in the funds last transferred to him, and to a larger amount of the original fund; held, that

SURROGATE.

1. Unless the authority (whatever it may be) the surrogate has to decree the payment by an administrator, after his removal, of the assets in his hands to his successor be derived from some other source than the right of the latter to an account, a decree directing him not only to render an account of his proceedings as administrator, but to show cause why the assets in his hands should not be paid over to the latter, is, so far as relates to any direction made thereon for payment by the removed administrator of such assets to his successor, void for want of jurisdiction. (*Annett agt. Kerr*, 2. Robt. 556.)
2. The enforcement of the delivery, by a removed administrator, to his successor, of assets in his hands, is not among the powers of the surrogate enumerated in any statute; nor is it incidental to the exercise of any enumerated power. (*Id.*)

TAXES AND ASSESSMENTS.

1. The residence of an inhabitant of a town during the months of June, July and August, therein, gives to the assessors of the town jurisdiction over his person and property, for the purposes of completing an assessment of his property. (*Boyd agt. Gray, ante*, 323.)
2. If there is any change of residence or ownership of property after the 1st day of July, it does not affect the assessment roll. Any changes which the assessors are authorized to make after that time are simply such as may be required to correct mistakes. (*Id.*)
3. If assessors err in their decision, upon the application of a person to correct his assessment made after the 1st of July, it is not such an error as invalidates the assessment or the tax afterwards based upon it. (*Id.*)
4. The omission to copy upon the tax roll the *affidavit* made by the assessors, and annexed to the original roll, before its delivery to the supervisors, is not a jurisdictional error, and cannot be set up to prevent the collection of the tax. (*Id.*)
5. Where, on the 1st day of August, an assessment has been properly made of the property of an inhabitant of the town, he cannot after that time shift his property and convert it into other

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- property not liable to assessment, and, on the day fixed for reviewing the assessments by the assessors, apply and have his name and the amount assessed against him stricken from the assessment roll. (*Id.*)
6. The plaintiff was the owner of a summer residence in one of the towns of Erie county, and a winter residence in the city of Buffalo. He resided in the city with his family, until the month of June, when he went, with his family, to the residence in the country, where they remained during the summer. His principal business was carried on in the city, to which he attended personally, going to his family at night, and returning mornings. The defendants, as assessors of the town where he had his summer residence, in the year 1864, assessed him for personal property, not knowing that he had or claimed any other residence. The tax was levied and collected of the plaintiff on said assessment, and he brought this action to recover the money back: *Held* that the action could not be maintained, even though the assessment was erroneous. (*Bell agt. Pierce*, 48 Barb. 51.)
7. A steamship company, incorporated under the laws of New York, for the transportation of passengers and freight between New York and Brazil, whose capital is invested in vessels employed for that purpose, and whose office is located in the city of New York, is not exempted from state taxation on its capital, under the constitution of the United States, on the ground that the whole amount is invested in steamships engaged in foreign commerce and in carrying the mails under a contract with the United States. (*The People ex rel. The U. S. and Brazil Steamship Co. agt. The Commissioners of Taxes*, 48 Barb. 157.)
8. Such an assessment in no way interferes with the power of congress to regulate commerce, either with foreign countries or between the states. (*Id.*)
9. When the assessors, in their return to a writ of *certiorari*, state that they had perfected the assessment roll and delivered the same, duly certified, to the supervisor of the town, and that the same was not in their possession or control at the time the writ was served on them, the court will dismiss the writ, as to them. (*The People ex rel. The Buffalo and State Line Railroad Co. agt. Fredericks*, 48 Barb. 173.)
10. The only questions the court can consider upon the *certiorari* brought to re-
- view an assessment under the general tax law, are whether the assessors had jurisdiction to assess the relator, and have kept their proceedings within the bounds of such jurisdiction. (*Id.*)
11. Assessors are not bound to reduce the value of the property of any party deeming himself aggrieved by their assessment to the amount fixed in his sworn statement and examination before them, but they are to fix the value after such statement is before them, as they may deem just, having in view the general duty to assess property "at its full and true value, as they would appraise the same in payment of a just debt due from a solvent debtor." (*Id.*)
12. The real estate of railroad companies should be assessed at its value for the purpose to which it has been adapted, and not as mere farming lands; and in estimating the same, the assessors are not bound to consider it as mere land and superstructure isolated in their town from the other parts of the road. They are entitled to estimate the value of that part of the real estate within their jurisdiction which contributes to make up a complete and useful railroad extending beyond the town they represent. What may be properly considered in estimating that value discussed. (*Id.*)
13. A railroad corporation should be regarded as a resident of the several towns and wards through which its road extends, within the meaning of the tax laws, and assessed therein for its real estate, the same as taxable inhabitants are assessed for their real estate situated therein. The real estate of railroad companies which is occupied and used by them for railroad purposes is not required to be assessed as "non-resident lands." (*Id.*)
14. Certificates of indebtedness of the United States, issued pursuant to the acts of congress passed in 1862, are not "securities" within the act of congress of February 26, 1862, exempting from taxation all "stocks, bonds and securities of the United States." (*The People ex rel. The Phoenix Fire Insurance Co. agt. Gardiner*, 48 Barb. 608.)
15. They are merely certificates or acknowledgments of a pre-existing indebtedness, incurred in the ordinary way, without any security or any specific pledge of the public faith. (*Id.*)
16. Congress, in exempting "securities" from taxation, has not excluded the states from the power to tax these certificates. (*Id.*)

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17. The act of the legislature of April 6, 1866, (*Laws* of 1866, ch. 418,) does not limit the authority of the county treasurer of Kings county, in issuing the certificates of indebtedness specified in section 3, to cases of taxes on investments which have been judicially decided to be exempt. (*Id.*)
18. A shareholder who has been assessed upon the value of his shares in a bank or banking association pursuant to the act of 1866 (ch. 761), is not entitled to a reduction, by the assessor, of valuation on account of his debts. (*People agt. Delan*, 36 N. Y. R. 59.)
19. The legislature, by the said act of 1866, did not intend to change the policy before pursued by the state in taxing bank capital. (*Id.*)
20. Sales for taxes and assessments, in the city of New York, are a mode of transferring title by operation of law, in the nature of a forfeiture; and all the conditions of such sale required by law being conditions precedent, must be literally followed. (*Adriance agt. McCafferty*, 2 Robt. 153.)
21. A notice published by the assessors, requiring all persons opposed to an assessment to present their objections, in writing, to the *assessors*, instead of to the *chairman* of the board, as required by the statute, is not a compliance with it, but is irregular, insufficient and void. (*Id.*)
22. The publication of a notice in papers, after the period for which they were appointed corporation papers, according to law, has expired, without any renewal of the appointment, is void. (*Id.*)
23. To render sales for assessments valid and binding, the city corporation should, at the end of each and every year, designate, by ordinance, the proper newspapers for the publication of notices. (*Per McCunn, J.*) (*Id.*)

TAX SALE.

1. If the redemption of land sold for taxes is prevented by the misconduct of the public officer through whom the redemption is to be effected, the title will not pass by the deed to the purchaser. (*Van Benthuyzen agt. Sawyer*, 36 N. Y. R. 150.)
2. But when the officer has furnished the necessary information to the party seeking to redeem, and the party neglects to avail himself of such information, he cannot, by mere neglect on his

part, make it the duty of the officer to furnish him the same information a second time. (*Id.*)

3. In such case it is not to be presumed that the failure to redeem was owing to the neglect of the officer to furnish such information a second time. (*Id.*)

TELEGRAPH

1. An agent or broker cannot maintain an action against a *telegraph company*, for damages arising from an error or mistake made by the company in transmitting a message from his principal to him, where he acts under the message in the name of and for his principal. (*Rose agt. U. S. Telegraph Co. ante*, 308.)

TENANTS IN COMMON.

1. One tenant in common, although he have the exclusive possession of the common property, is not liable to account to the other tenants in common, either for rent or for a share of the profits, unless there be an express agreement that he shall do so. (*Wilcox agt. Wilcox*, 48 Barb. 327.)
2. Where a married woman is a tenant in common with others of property occupied by her and her husband, his occupation being that of his wife, no action will lie against him by the other tenants in common for rent, without proof of an agreement to pay it. (*Id.*)

TENANT BY THE CURTESY.

1. The estate of tenant by the courtesy, as it existed at common law, was not abrogated by the acts of 1848 and 1849, as amended in 1860 and 1862, "for the more effectual protection of the property of married women." (*Beamish agt. Hoyt*, 2 Robt. 307.)
2. Where a married woman, seized of real estate, has issue of the marriage born alive, and dies without disposing of such property, and her husband survives her, he becomes entitled to an estate as tenant by the courtesy, which estate will pass to a receiver of his property appointed in supplementary proceedings, who may by virtue of such receivership recover the rent due at the time of his appointment, as well as that accruing afterwards. (*Id.*)

TRADE MARKS.

1. Where the defendant has procured a

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trade mark closely resembling one already in use by the plaintiff, and has attached it to a perfume manufactured by him, adopting the same name and style of packages as the latter, with the intention of counterfeiting the plaintiff's trade mark, as well as imitating the article and style of packages used by him, and of appropriating, through such counterfeit label, the market obtained for the perfumery of the plaintiff, and in this design he has been to some extent successful, and has thereby injured the plaintiff, it is a proper case for an injunction to restrain the use of the label or trade mark, notwithstanding the defendant sets up the defense that the plaintiff, in selling his perfume, is attempting to impose upon and defraud the public; if the evidence upon that subject is conflicting. (*Smith agt. Woodruff*, 48 Barb. 438.)

2. That defense ought to be suggested by the court, whenever the imposition on the part of the plaintiff is flagrant. Thus, when a quack compounds noxious and dangerous drugs, hurtful to the human constitution, and advertises them as a safe and sure remedy for disease, or when a charlatan avails himself of the prejudice, superstition or ignorance of some portion of the public to palm off a worthless article, even when not injurious, the case falls beneath the dignity of a court of justice to lend its aid for the redress of such a party, who has been interfered with by the imitations of another quack or charlatan. (*Per LEONARD, P. J.*) (*Id.*)
3. But the suggestion comes with a poor grace from one who has, by the imitation, been guilty of the same fraud or imposition upon the public, if such it happen to be. (*Per LEONARD, P.J.*) (*Id.*)

TRESPASS ON LAND.

1. In an action before a justice of the peace, for trespass on land, the plaintiff, in his complaint, described his entire farm of seventy acres by metes and bounds, and alleged the trespasses to have been committed thereon, and claimed damage in gross "for the several aforesaid trespasses and grievances;" and the defendant interposed a general denial, and then set up a separate defense, alleging title in himself to a certain portion of the premises, describing it by metes and bounds, and alleged that "some or one" of the alleged trespasses were committed on that piece of land. The justice discontinued the whole action; and on the trial in the supreme court, no evidence was

given of any trespass on this particular piece of land, and no question of title was raised by the proofs, and it was found that the trespasses were committed on the plaintiff's land, as to which there was no question of title, and the damages awarded amounted to some \$26:

2. Held, that the defendant was entitled to costs. (*See Hall agt. Hodskins*, 30 How. 15.) (*Shall agt. Green*, ante, 418.)
3. The owner of land out of possession may maintain an action for an injury to the land, to the inheritance. (*Freer agt. Stotenbar*, ante, 440.)
4. A lease of land for agricultural purposes does not give the tenant a right to work a quarry on the land. (*Id.*)
5. If, in an action between a tenant and a trespasser claiming title, the defendant pleads title, and is defeated in the action, he cannot afterwards, in an action between himself and the landlord, mitigate the question of title again. The first record is conclusive against him, notwithstanding the parties are different. (*Reversing S. C. 36 Barb. 641.*)

TRIER.

1. Court may act as trier upon challenge to favor, and where there are no objections stated, the assent of parties to be presumed. (*O'Brien agt. The People*, 36 N. Y. R. 276.)
2. It is competent for the court to act as triers upon challenge to favor; and the assent of the parties thereto is to be presumed, where no objections are raised, and there is no request to submit the question to triers. (*Id.*)

TROVER AND CONVERSION.

1. In an action for the unlawful taking and conversion of personal property, the plaintiff is entitled to recover the value of the property taken; and the fact that the defendants were creditors of the plaintiff, and took the property under a void attachment, will not mitigate the injury nor reduce the damages. (*Kelly agt. Archer*, 48 Barb. 68.)
2. A legal title, or right of possession, is indispensable to the maintenance of an action of trover. An equitable right merely, without any muniment of legal title, or of a legal right of possession, is not sufficient. (*Fulton agt. Fulton*, 48 Barb. 581.)

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TRUSTEES.

1. Where an action is brought, and the complaint alleges that the plaintiffs were appointed trustees to receive subscriptions for the benefit of a public corporate institution, and claiming to recover of the defendant, who had signed a general subscription agreement, the amount of his subscription, the plaintiffs are *trustees of an express trust*, under section 113 of the Code, and are not liable for *costs, personally*, on the dismissal of the complaint. (*Slocum agt. Barry, ante, 320.*)
2. An order denying a motion to set aside an execution issued for costs against plaintiff personally, who claim to act as trustees, is *appealable*. (*Id.*)
3. An action under section 432 of the Code, in the nature of a *quo warranto*, by the people on the relation of a person claiming title to the office of *Trustee of a school district*, will not lie, where that question has been presented to the superintendent of public instruction and decided by him adverse to the relator. The act of 1864, relating to public instruction, makes the decision of the superintendent on that question final. (*Hill agt. Collins, ante 336.*)

TRUSTS.

1. The provisions of the Revised Statutes (3 R. S. p. 15, § 51, &c.), must be construed as abolishing all trusts in land paid by one person, when the conveyance is given to another, whether for the benefit of the party paying the money, or for another, except where the conveyance is so taken without the knowledge or assent of the party whose money is so used, and excepting also the trust in favor of creditors. These provisions of the statute vest the title to the property in the alienee. (*Gilbert agt. Gilbert, ante, 142.*)
2. Where, by the terms of the will, the legal title of the estate devised is vested in the defendants, who are the sole beneficiaries, if there remains a surplus after the trusts of the will are fully satisfied, such surplus follows the legal title, discharged of the trusts of the will. (*The Attorney General agt. The Minister, etc., of the Dutch Reformed Protestant Church of New York, 36 N. Y. R. 452.*)

UNCONSTITUTIONAL.

1. The clause in the act of 1857, transferring to the metropolitan police board

the power of appointing the police court clerks in the city of New York, is unconstitutional and void. (*Deroy agt. Mayor, etc., of New York, 36 N. Y. R. 449.*)

2. The police court clerks continue to be, as they were before the constitution was adopted, local officers of the city of New York; and the act in question does not assume to extend the territorial limits of their authority. (*Id.*)

USURIOUS AGREEMENT.

1. Can be assailed only by a party injuriously affected by it, or one claiming under him. (*Williams agt. Till, 36 N. Y. R. 319.*)

USURY.

1. Where usury is set up as a defense, the usurious contract should be so pleaded as that it may appear what rate or amount of interest was taken or secured, and on what sum and for what time; and the answer should show a corrupt intent. (*The National Bank of the Metropolis agt. Orcutt, 48 Barb. 256.*)
2. Where these facts appear from the terms of the answer, nothing further is necessary, to make it sufficiently definite. (*Id.*)
3. If the answer avers that the plaintiff discounted the drafts sued on at an usurious rate of interest, contrary to the statute in such case made and provided, and then specifies the amount of interest taken, this, though it may or may not be an insufficient averment of a corrupt intent, is not so palpably defective in this respect as to authorize a judgment for the plaintiff for frivolousness. (*Id.*)

VARIANCE.

1. Although the plaintiff's complaint, in an action to recover back money paid by mistake, alleges a demand and a refusal to pay back the money, and the defendant's answer admits the refusal to pay, proof of a promise by the defendant, afterwards, does not present such a variance between the cause of action alleged and the evidence as will preclude a recovery. (*Rosboro agt. Peck, 48 Barb. 92.*)

VENDOR AND PURCHASER.

1. The existence of outstanding leases, upon premises contracted to be sold, is

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- no reason for refusing a judgment for a specific performance, against the vendor, so far as he is able to carry out the the agreement. (*Jerome agt. Scudder*, 2 Robt. 169.)
2. A decree for a specific performance by a vendor should not direct the defendant to procure releases from parties over whom he has no control. (*Id.*)
3. The judgment in such a case should direct a reference to ascertain whether the defendant can give a good title; also the amount of any incumbrance which is a lien on the premises, and can be discharged by the payment of money; and the deduction which should be made from the purchase money, as compensation for the outstanding terms of tenants. It also should require the payment to the referee, by the plaintiff, of so much of the purchase money as may be necessary to pay off all incumbrances which can be discharged, and to the defendant, or into court for his benefit, of the residue thereof, after deducting the amount to be allowed for such compensation. It should also provide for the discharge, by the referee, of the incumbrances which can be so paid off, and the execution, within a reasonable time, by the defendant to the plaintiff, of a good and sufficient conveyance of the promises, &c., to be delivered upon the payment of the sums before mentioned. (*Id.*)
4. In equity, a reluctant purchaser will not be compelled to take a doubtful title. If the doubt of the sufficiency of the title be reasonable and practical, the the court, in its discretion, will excuse performance by the purchaser. (*O'Reilly agt. King*, 2 Robt. 587.)
5. At law, however, the rule is different. There the party repudiating the contract, and seeking to recover back a deposit, must satisfy the court that the title is absolutely bad, and before he can succeed the court must so decide. A merely doubtful title will not be sufficient. (*Id.*)
6. On a contract for the sale of goods deliverable at a future day, at the buyer's option, the vendor, in an action for the price, is not required to prove that he was the owner or in possession of the particular goods, at the time of making the contract. (*McIlraine agt. Egerton*, 2 Robt. 422.)
7. Such a contract is not "per se" invalid, on the mere ground that the vendor was not in possession of the goods at the time of making the contract. (*Id.*)
8. A contract of that description is not necessarily within the statute of betting and gaming (1 R. S. 662), or void at common law, as being against public policy. (*Id.*)
9. An absolute contract for the sale of an interest in land, authorizing the purchaser to take immediate possession, the consideration to be paid on demand vests in the purchaser the equitable interest in the land the moment it is executed and delivered. (*McKechnie agt. Sterling*, 48 Barb. 830.)
10. Such an agreement is not a covenant for the immediate possession, or a condition therefor, the breach of which will avoid the contract. (*Id.*)
11. The destruction of the building on the premises by fire, after the making of such a contract, is no defense to an action for the purchase money; the purchaser being the owner thereof, and having an immediate interest therein. (*Id.*)
12. In an action by a vendor to recover damages for the removal of a building standing upon premises sold under executory contract, while the premises were in the possession of the vendee, it is competent for the defendants to prove that the plaintiff has no title to the premises in question at the time of making the contract, or at any time afterward, and no power or means of procuring such title. (*Smith agt. Babcock*, 36 N. Y. R. 167.)
13. The instances considered in which a party may deny the title of his vendor. (*Id.*)
14. Where the persons against whom the action is brought have made no contract, but are trespassers simply, the idea of estoppel or of privies is inapplicable. They are liable to the real owner for an injury to the reversion, and in an action against them for such damages, may show that the plaintiff is not such owner. (*Id.*)

VERDICT.

1. A verdict of \$4,500, for an injury to the plaintiff, caused by the negligence of the defendants' servants, resulting in the loss of an arm, will not be deemed excessive. (*Menz agt. The Second Avenue Railroad Company*, 2 Robt. 356.)

VESSELS.

1. Stock purchased by the master of a vessel, with a view of securing what is sometimes denominated a master's interest, has no privilege attached to it other

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than attaches to stock purchased or owned by any other party. (*Ward agt. Buckman*, 36 N. Y. R. 26.)

2. There is, in law, no such privilege attaching to stock in a vessel owned by the captain or master thereof. (*Id.*)
3. A captain of a vessel having an interest therein is liable to be removed by a majority in interest of the owners of such vessel. (*Id.*)

WHARFAGE.

1. The collection of wharfage, under the act of 1860, April 10, chapter 416 laws of 1860, can only be made in the manner pointed out in the 217th section of the act of April 9th, 1863, which is by a warrant to distrain the goods and chattels found on board of the vessel, for wharfage accrued under section 1 of the said act of 1860, and on the pier or bulkhead, for that accrued under section 3 of same act. (*Warren agt. McDiarmid, ante*, 304.)
2. It is not proper to bring an action to enforce such a lien. A receiver will be denied in such an action, even though a case therefor, as well as of wharfage and lien, is made out by the plaintiff. (*Id.*)

WILL.

1. Where the introductory clause in a will shows that the testator designed to dispose of his whole estate, a subsequent devise of lands without words of perpetuity, may be held to convey the fee. (*Van Derzee agt. Van Derzee*, 36 N. Y. R. 231.)
2. But this will not be the effect unless the subsequent parts of the will confirm such an intention in the testator. (*Id.*)
3. Where, by the terms of the will, the testator had devised his estate to his three children in fee, share and share alike, providing, however, that in case either should die without issue, that such share should go to the surviving children equally: *Held*, that one of the children dying leaving an heir, such heir took absolutely the estate of its parent. (*Guernsey agt. Guernsey*, 36 N. Y. R. 267.)
4. *Held*, also, that such heir could not be deemed to be included in the term "survivor or survivors," as used in the will. That, on the death of one of the three without heirs, the remaining child living took such share. (*Id.*)
5. The declaration by a testator in his

will that his purpose in devising to his widow a life estate in a dwelling is to provide her with a suitable residence is not sufficient to cut down the gift to a mere right of personal occupancy. (*Id.*)

6. The right of action against a trespasser for a mere injury to the possession of property demised, is in the tenant and not in the lessor. (*Tobias agt. Cohen*, 36 N. Y. R. 363.)
7. The subscription of the testator and the publication of the instrument are independent facts, each of which is essential to the complete execution of a will. (*Baskin agt. Baskin*, 36 N. Y. R. 416.)
8. If the signature is written by another, and concealed from the view of the testator and the witnesses, the mere publication of the instrument as his will cannot be deemed an acknowledgment that the unseen subscription was made by his direction. (*Id.*)
9. When, however, the testator produces a paper bearing his personal signature, requests the witnesses to attest it, and declares it to be his last will and testament, he thereby acknowledges the subscription, within the meaning of the statute. (*Id.*)
10. The statute does not require that the subscribing witness to the execution or to the acknowledgment of the execution of a will should each subscribe in the presence of the other, nor does it require that the subscribing witness should be shown the signature of the testator to the will, at the time of the acknowledgment of its execution. (*Willis agt. Mott*, 36 N. Y. R. 486.)
11. If the testator present the will, already subscribed by him, to the witness, acknowledge that he has executed it as such will, that the same is his will, and requests him to sign the same as a witness, and he sign it in the presence of the testator, it is sufficient. (*Id.*)
12. The evidence furnished of the regularity of the execution of a will by proving the signature of a deceased witness thereto, is strong or weak, according to the known character of the deceased witness, and his knowledge of what was requisite to the proper execution of such will. (*Id.*)
13. Where all the requisites to the due execution of a will are fully complied with and proved, so far as relates to one of the attending witnesses, and as to the other, it is proved that although

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he did not see the testator sign the will, it having been signed before he came into the room, yet that he signed the same as a witness, at the testator's request, and heard him declare at the time that it was his *last will and testament*, this is sufficient proof of the execution of the will to admit the same to probate, though the testator does not state to the witness that he has signed the will. (*Bastin agt. Bastin*, 48 *Barb.* 200.)

WITNESS.

1. The object of the exception in section 399 of the Code of Procedure, declaring that a party to an action shall not be examined as a witness in his own behalf against parties who are representatives of a deceased person, in respect to any "transactions or communications had personally by him with the deceased," was to exclude a party from testifying to any occurrence wherein the other party, who has died since, was or must have been an actor. It was not designed to exclude the testimony of a party as to an occurrence at which the other deceased party needed not to have been present, or a fact which he needed not to have known. (*Franklin agt. Pinckney*, 2 *Robt.* 429.)
2. The ownership of money which had been deposited by the plaintiff in the same bank in which the deceased kept his funds, and was entered to the credit of the latter, in his bank book, with his consent, is not within the meaning of such provision a "transaction or communication" between the plaintiff and the decedent personally, which would exclude the testimony of the former, as to his ownership, in an action against the personal representatives of the latter for such sum. (*Id.*)
3. A witness, who had known H. for four or five years, and pretty well for a year or two previous to certain transactions in question, had been in the habit of selling him goods on credit; had seen statements of H.'s business, wherein the dividends and profits of him and his partner were some \$4,000 in six months; knew what his credit was, at the time of a sale in question; and that it was good; being asked the question, "Did you learn at that time what H. was reputed to be worth?" Held that the witness was competent to testify as to H.'s responsibility and credit, and that an objection to such question was properly overruled. (*Iselin agt. Peck*, 2 *Robt.* 629.)
4. A witness, who did not know H., had no knowledge personally of his responsibility, or of his general reputation for pecuniary responsibility "except from his own books and records of his agency," was asked whether a paper produced contained a correct result of his books as to the standing of H. Held that the answer to this question was properly excluded. (*Id.*)
5. The amendment of section 399 of the Code making it applicable to surrogates' courts and proceedings therein, not only applied the provision allowing the examination of a married woman as a witness in her own behalf, on her application to the surrogate for letters of administration upon the estate of her deceased husband, but also the restriction on such examination; so that if she came within that restriction she could not be examined in her own behalf, against administrators, to prove any transaction had with the decedent. (*Angenne agt. Angenne*, 48 *Barb.* 417.)
6. The term party to an action, which was used before the section was extended to proceedings in surrogates' courts must be construed as applicable to all proceedings to which the first part of that section is made applicable. (*Id.*)
7. Where, upon an application by an administrator, to the surrogate, for leave to mortgage or sell the real estate of the intestate, a claim of the respondent, against the estate, which was disputed by the administrator, was tried by the surrogate, and after several witnesses had testified to conversations between the intestate and the claimant, which established a "transaction" between them, in relation to the subject matter of the controversy: Held that the claimant could not be examined as a witness to prove that no such conversations had occurred—that no such transactions had taken place; such testimony being "in respect to a transaction had personally between the deceased person and the witness." (*Dyer agt. Dyer*, 48 *Barb.* 190.)
8. In actions brought by husband and wife, where the husband has a direct pecuniary interest, he is a competent witness as a party called in his own behalf. (*Maverick agt. Eighth Avenue Railroad Co.* 36 *N. Y. R.* 378.)
9. That a married woman should hang out signals to a man for clandestine meetings, is an impeachment of her general character. (*Shepard agt. Parker*, 36 *N. Y. R.* 517.)
10. Upon a trial where the question is whether a certain note was given in

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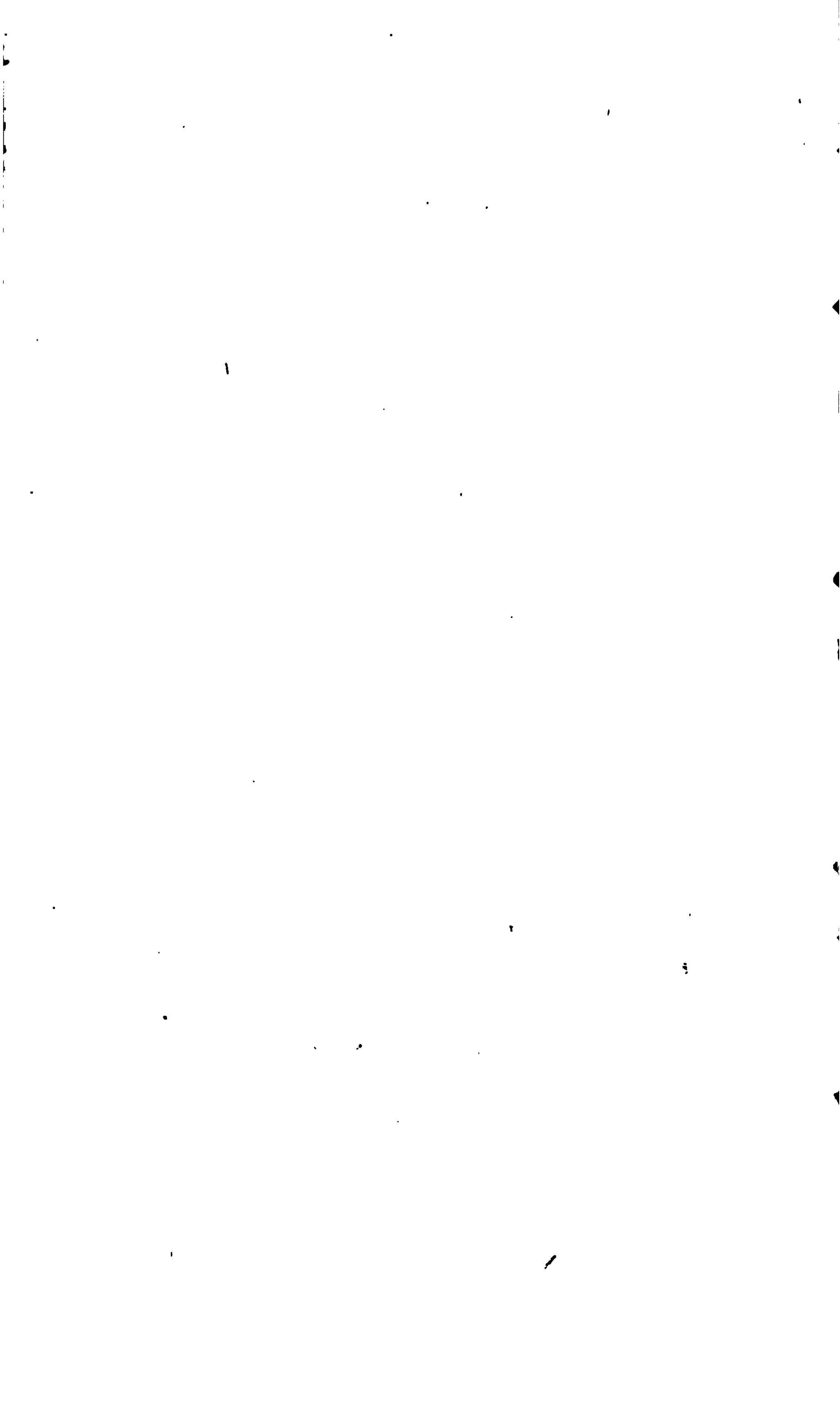
compromise of a charge of rape, and the person upon whom the offense was alleged to have been committed gives testimony tending to show that it was given in settlement of civil damages only, it is competent to ask her if she did not admit on the trial of the indictment against Austin for the alleged

rape, that she wrote him a letter in which she admitted that she hung out signals on a cherry tree to induce him to come to her house. Such acts are proper for the consideration of a jury in estimating the character of the witness. (*Id.*)

ERRATA.

In the case of *Pitt agt. Davidson*, ante page 355, several errors occur in the opinion of the court. On page 370, the 4th line from the top, read "adjudging" instead of *specifying*. On page 371, the 8th line from the top, read "the" instead of *a* (special term). On the same page, the 7th line from the bottom, read "some" instead of *even*. On page 372, the second line from the bottom, between "and personally" insert the word "brought," so that it will read "and brought personally." On the same page, the 13th line from the bottom, strike out the word "his" before the word "misconduct." On page 373, the 14th line from the bottom, between the words "cause, with" insert the following words, "and one question is, whether personal service upon the defendant, of the order to show cause." On page 374, the 3d line from the top, read "nature" instead of *return*. On the 4th line from top of same page, read "denouncing" instead of *determining*. On the 15th line from the top of same page, read "to pay" instead of *therefor*. On page 375, on the 6th line from the bottom, read "this court" instead of *the court*. On the bottom line of same page, read "absence" instead of *observance*. On page 377, the 8th line from the bottom, strike out the word *same*. On page 378, the top line, read "1867" instead of 1863. On the same page, the 9th line from the bottom, read "which" instead of *what*.

If we had received these corrections from Judge PARKER in season, we would have published the whole opinion again as corrected, and as suggested by him; but as they came too late for that purpose, we do the next best thing—to give the several corrections in an *errata*. We have, of late years, considered it a great risk to publish a *certified copy* of an opinion of the Court of Appeals, with reference to giving the true and correct opinion of the court. We had occasion to complain of the same thing in the case of *Yale agt. Dederer*, 20 How. 247; and if there has been any improvement in this particular since, we have been unable to perceive it, except, perhaps, in the increased fees for such copies. REP.



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COURT OF APPEALS.

DECISIONS RENDERED JANUARY, 1868.

Judgments affirmed with costs.

- The People ex rel. The Phoenix Insurance Company, appellant agt. Thomas A. Gardiner, County Treasurer, &c., respondent.
- The People ex rel. The Broadway National Bank, appellants agt. John T. Hoffman, Mayor, &c., and others, respondents.
- The People ex rel. The Bank of New York National Banking Association, appellants agt. Richard B. Connolly et al., respondents.
- The People ex rel. The Bank of New York, appellants agt. The Board of Supervisors of the County of New York, respondents.
- The People ex rel. The National Bank of the Republic of the City of New York, appellants agt. John T. Hoffman et al., respondents.
- Henry W. Hyde, respondent agt. John P. P. Lathrop, appellant.
- George H. McIntyre, respondent agt. The New York Central Railroad Company, appellants. (43 Barb. 532; 47 Id. 515.)
- Zachary Peck, assignee, &c., appellant agt. William Minot, Jr., executor, &c., resp't.
- The People of the State of New York, appellants agt. Abram Barre, respondent.
- Philip Pfieffer and another, appellants agt. Yetty Adler, respondent.
- Franklin W. Hunt, respondent agt. The Michigan Southern and Northern Indiana Railroad Company, appellants.
- Freeland T. Barney et al., respondents agt. Samuel K. Worthington, appellant.
- John H. Barringer, respondent agt. Stanley Hammond and another, appellants.
- Isaac H. Brower et al., respondents agt. Samuel Fraenthal, appellant. (20 How. 355; 9 Barb. 350.)
- Montague M. Hendricks et al., executors, &c., respondents agt. Philip Stark, appl't.
- Nicholas E. Paine, respondent agt. Thomas Brown, appellant.
- Edmund W. Howell, appellant agt. William Huyck, respondent.
- Frederick T. Carrington, respondent agt. Lucius B. Crocker, appellant.
- James Patrick and another, appl'ts agt. Benjamin F. Metcalf and another, resp'ts.
- James T. Howe, respondent agt. The Buffalo, New York and Erie Railroad Company, appellants. (38 Barb. 124.)
- Job Brookfield, respondent agt. George Remsen, sheriff, &c., appellant.
- Moses Taylor et al., appellants agt. The Atlantic Mutual Insurance Company, resp'ts. (9 Barb. 369.)
- Garrett S. Mott, appellant agt. The Union Bank, N. Y., respondents. (19 How. 267; 18 Id. 506; 17 Id. 354; 16 Id. 525; 39 Barb. 180; 13 Abb. 247; 8 Barb. 591.)
- William H. Van Kleck, appellant agt. Philip Le Roy and another, respondents. (37 Barb. 547.)
- The Farmers and Mechanics' Bank of Genesee, resp't agt. Jason Parker, appellant.
- Jonathan Thomas, respondent agt. Benjamin Akin, appellant.

Decisions Court Appeals.

- The Farmers and Mechanics' Bank of Genesee, respondents agt. Daniel M. Joslyn et al., appellants.
- The City Building and Loan Association, respondent agt. George L. Fatty, impl'd, &c., appellants.
- John H. Williams, respondent agt. Chester F. Shelley, appellant.
- Franklin B. Seacord, respondent agt. Caleb Morgan and another, appellants. (17 How. 394.)
- Elijah B. Allen, respondent agt. Marvin Holt et al., appellants.
- John W. Bates, respondent agt. Enoch H. Rosekrans, appellant. (23 How. 98.)
- The People ex rel. Thomas et al., respondents agt. Commissioners of Highways Town of Milton, appellants.
- Western Transportation Company, appellants agt. Charles H. Marshall et al., resp'ts. (37 Barb. 509.)
- Calvin Goodwin, successor, &c., appellant agt. Mary Nelin, survivor, &c., resp't.
- Alfred C. Howe, appellant agt. Charles E. Elliott et al., respondents.
- Francis L. Coghlan, respondent agt. William B. Dinsmore, president, &c., appl't.
- The People ex rel. Delvecchio, appellant agt. Board Supervisors Kings County, respondent. (23 How. 89.)
- Elijah B. Allen and another, appellants agt. Norman Sackrider and another, resp'ts.
- The Chatham Bank, respondent agt. Frederick B. Betts, impleaded, &c., appellant. (23 How. 476; 9 Barb. 552.)
- Horatio N. Curtis, appellant agt. Simon Butts, respondent.
- Isaac Butts, respondent agt. Daniel Wood et al., appellants. (38 Barb. 181.)
- Alexander McCotter, appellant agt. The Mayor, &c., N. Y., respondent. (55 Barb. 609; 16 Abb. 265.)
- The President, Directors, &c., of the Westfield Bank, respondents agt. Peter P. Corren, appellant.
- Catherine N. Jenkins, administratrix, and another, appellants agt. David E. Wheeler, respondent.
- John C. Martin et al., respondents agt. Charles Kunzmuller et al., appellants. (10 Barb. 16.)
- The Monroe County Savings Bank, appl'ts agt. The City of Rochester and another, respondents.
- The Rochester Savings Bank, appl'ts agt. The City of Rochester and another, resp'ts.
- Thomas Wiltsie, respondent agt. James Eadie and another, appellants.
- John Stewart, survivor, &c., respondent agt. Henry Brown, sheriff, &c., appellant.
- Stephen W. Howell, appellant agt. The City of Buffalo, respondent.
- Hiram Slocum, respondent agt. Pliny Freeman and another, appellants.

Judgments reversed and new trials ordered, with costs to abide the event.

- Eugene S. Ballin et al., executors, &c., appellants agt. Charlotte B. Dillaye, resp'ts.
- Alexander Spaulding, respondent agt. Gabriel Furman, survivor, &c., and another, appellants.
- John Radway, Jr., et al., appellants agt. Jeremiah Briggs and another, respondents.
- Samuel A. Swinerton et al., respondents agt. The Columbian Insurance Company, appellants. (9 Barb. 361.)
- Austin Dunham and another, respondents agt. Stephen C. Williams and another appellants. (36 Barb. 136.)
- Thomas R. H. Dupuy et al., appellants agt. Austin Strong and another, respondents.
- William Milton, respondent agt. The Hudson River Steamboat Company, appellants.
- Thomas J. Wells, respondent agt. Charles Kelsey, appellant. (25 How. 384.)

Decisions Court Appeals.

The Mayor, &c., of N. Y., appellants agt. August Sibberns and another, respondents. Robert Green and another, respondents agt. James M. White, appellant. Alceste Button, respondent agt. Emanuel McCauley, appellant.

Rearguments ordered.

John Ely, respondent agt. Paul Spofford and another, appellants. Lewis Johnson et al., respondents agt. Myron H. Clark and another, appellants. Charles Kelsey, respondent agt. Robert M. Ward et al., appellants. (42 Barb. 582; 38 Id. 269; 16 Abb. 98, 14 Id. 107; Id. 372.) James R. Wolfkiel, respondent agt. The Sixth Avenue Railroad Company, appellant. (16 Abb. 221.) James Callanan, Jr., and another, appellants agt. Jasper T. Van Vleck et al., resp'ts. (36 Barb. 324.)

Judgments affirmed with costs and ten per cent damages.

Harvey Bissell, respondent agt. Alonzo Trumbull, appellant. Isaac N. Phelps and another, respondent agt. George Van Deusen, appellant.

Orders granting new trial reversed, and judgment of special term affirmed, with costs. Abraham Eveland, app'l't agt. George Wheeler, administrator, and another, resp'ts. Asahel H. Haviland, appellant agt. John P. Hayes, respondent.

Orders appealed from affirmed with \$10 costs of motion.

James B. Clemens, respondent agt. James Clemens, Jr., et al., appellants. Robert Hogan, respondent agt. Azor Hoyt et al., appellants.

Orders granting new trial affirmed, and judgment absolute for defendants with costs, pursuant to stipulation.

The People ex rel. Lanchantin et al., appellants agt. Pierre A. Lacoste et al., resp'ts. Simeon Fitch and another, appellants agt. Zachariah Dederick, respondent.

Appeal dismissed with costs.

Melinda J. McClure, respondent agt. Board of Supervisors of Niagara County, appellants. (33 How. 202.)

Judgment affirmed, with all the costs to either party therein of this action to be paid out of the funds of the estate to be adjusted.

James H. Seguine, appellant agt. Henry S. Seguine and another, executors, &c., respondents. (3 Abb. N. S. 442.)

Order appealed from reversed, and sale set aside and a re-sale ordered, with \$10 costs of motion.

Charles King et al., respondents agt. William H. Platt et al., appl'ts. (34 How. 26.)

Judgment of general term reversed and judgment of sessions affirmed, and the proceedings remitted to the supreme court to proceed therein according to law.

The People of the State of New York, plaintiffs in error agt. Charles Bennett, defendant in error.

Judgment reversed and judgment for plaintiff on verdict with costs.

Robert Gordon and another, appellant agt. Lewis H. Hostetter, respondent,

Order appealed from affirmed with costs.

The People ex rel. Stephens, respondent agt. Peter Halsey, treasurer, &c., appl't

Decisions Court Appeals.

Order of general term reversed and order of the special term affirmed with costs.
Charles Pitt and another, appellants agt. Erastus Davison, impl'd, &c., respondents.
(34 How. 335; 37 Barb. 97; 3 Abb. N. S. 398.)

Order affirmed, and judgment absolute for plaintiffs, and proceedings remitted to the supreme court, with directions to ascertain the amount due to the plaintiffs and render judgment therefor with costs.

John T. Lee and another, respondents agt. Arunah M. Adsit et al., appellants.

Order granting new trial affirmed, and judgment absolute for plaintiffs, and proceedings remitted to the supreme court, with directions to ascertain the amount due to plaintiffs, and to render judgment therefor with costs.

John T. Lee and another, respondents agt. James Morgan et al., appellants.

Order granting new trial reversed, and judgment on verdict affirmed with costs.
William Buswell, appellant agt. Horace J. Pioneer, respondent.

Judgment reversed and new trial ordered.

Calvin M. Northrop, plaintiff in error agt. The People of the State of New York, defendants in error.

Order for new trial affirmed, and, pursuant to stipulation, judgment for defendants. Such judgment is limited to the sum of \$3,000 and interest, together with expenses and freight, insurance and storage, with interest on those items. The defendants are at liberty to apply for a writ of inquiry to ascertain their damage, or a reference, or such other proceedings for that purpose as they may be advised. The record is remitted to the supreme court to ascertain the amount so due to the defendants, with directions to render judgment therefor with costs.

The Ohio and Mississippi Railroad Company, appellants agt. William M. Kasson et al., respondents.

Order granting new trial reversed, and judgment on report of referee affirmed with costs.
George A. Dillingham, appellant agt. Carlos A. Bolt and another, respondents. (35 Barb. 38.)

Judgment affirmed, with costs of both parties on this appeal to be paid for out of the funds.
Henry M. Prowitt et al., respondents agt. Washington Rodman et al., appellants.

Judgment affirmed, without costs to either party of this appeal, if plaintiffs elect and consent to deduct all allowances for wages after Sept. 8th, 1853, and interest thereon therein included in the judgment. If they do not so elect and consent within twenty days after notice of this judgment, then the said judgment is reversed and a new trial ordered, costs to abide the event.

Catherine N. Jenkins, administratrix, &c., resp't agt. Ravid E. Wheeler, appl't.

Judgment affirmed.

Frederick H. W. Wentz, impleaded, &c., plaintiff in error agt. The People, &c., defendants in error.

Judgment reversed, and judgment that F. O. Lebring took only a life estate in the thirty acres mentioned, and on his death the same descended, as in case of the intestacy of his father, to the heirs at law of his father, and the action is remitted to the supreme court to proceed therein accordingly. No costs to any of the parties allowed on this appeal.

Ellen Harris, respondent agt. The American Board of Commissioners, impleaded, &c., appellants.

Decisions Court Appeals.

DECISIONS RENDERED MARCH, 1868.

Judgments affirmed with costs.

- Charlotte M. Patchin, executrix, &c., respondents agt. John M. Peek, appellant.
Mary Jane Blossom, respondent agt. Joseph C. Burritt and ano. adm'rs, &c. appellants.
John Binese, ex'r, &c., and Louisa La Farge, ex'x, &c., resps. agt. Wm. L. Wood, appellant. (47 Barb. 624).
Alexander J. Coffin, appellant agt. James Reynolds, executor, &c. respondent.
Ann Driscoll, adm'x, &c., resp. agt. the Newark and Rosendale Lime and Cement Company, appl't.
People, &c.. appellants agt. Henry L. Lansing and Mary E. Richmond, executors, &c., respondents.
William D. Sloan and another, respondents agt. Pierre C. Van Wyck, impl'd, &c., appellant (47 Barb. 634.)
Waterman L. Ormsby, appellant agt. Benjamin Douglass, respondent.
Christian F. Holtz, respondent agt. John A. Boppe. appellant.
The Mayor, &c., of New York, resp's agt. the St. Nicholas Fire Ins. Co., appl't.
The Mayor, &c., of New York, resp's. agt. The Relief Fire Insurance Co., appl't.
Thaddeus A. Lawrence, respondent agt. Alfred Ely, appellant.
Reuben Robie, et al., Trustees, &c., respondents agt. Richard Hardenbrook and another, appellants.
Henry Plate, respondent agt. The N. Y. Central Railroad Co., appellant.
Stephen Philbin and ano., resp'ts agt. Richard Patrick, appl't (22 How. 1.)
William Armitage, respondent agt. Frank Pulver et al., appellants.
Obadiah W. Candee and ano., resp'ts., agt. Holloway G. Haywood, appl't.
Elizabeth V. Henry, respondent agt. Charles Wilkes, appellant.
James R. Wolfkiel, respondent agt. The Sixth Avenue Railroad Co., appellant (16 Abb. 221).
Charles W. Swift, appellant agt. The City of Poughkeepsie, respondent.
Joseph B. Smith, appl't agt. The Mayor, &c., of New York, resp't (21 How. 1; 34 Id. 508).
The People, &c., respondents agt. James M. Raymond, appellant.
Russel F. Hicks, respondent agt. Amariah H. Bradner, appellant.
John Waffle, respondent agt. John Dillenbeck, appellant.
George R. Shibley and others, appellants agt. David Angle and others, respondents.
The Mayor, &c., of New York, resp'ts agt. the Excelsior Fire Ins. Co., appl't.
Clara A. Davenport, respondent agt. Elisha Ruckman and The Mayor, &c., appl't (16 Abb. 341; 10 Bone. 20).
Catharine S. Gibson, respondent agt. The American Mutual Ins. Co. appellant.
George Clark, appellant agt. George Tunnicliff and another, respondent.
The People ex rel. Thomas Reilly, resp'ts agt. Frederick Johnson and ano., appl'ts.
Charles H. Winfield, respondent agt. Samuel B. Potter, appellant.
Joseph Colwell, respondent agt. Herbert Lawrence, Jr., and another, appellants.
Robert M. Ward and another, respondent agt. Charles Kelsey, appellant.
Charles Kelsey, respondent agt. Robert M. Ward et al., appellants.
Charles Kelsey, resp't agt. Robert M. Ward et al., appl'ts (42 Barb. 582; 38 Id. 269
6 Abb. 98; 14 Id. 107; Id. 372).
George Lowman, resp't agt. William P. Yates, surviving adm'r, &c., appl't.
Israel Casey, respondent agt. Henry M. Janes, appellant.
The People, &c., appellants agt. Byron P. Tubbs and others, respondents.
William Davis, respondent agt. William E. Keyes et al., appellants.
Thomas Maher and another, respondent agt. Richard Carman Combe and another executors, appellants.

Decisions Court Appeals.

Order affirmed with costs.

Alexander Hamilton, Jr., and ano., appl'ts agt. Wendell Wright, resp't. Hiram Slocum, trustees, &c., respondents agt. Charles H. Barry, appellant.

Order of General Term reversed, with costs, and motion of defendant in Court below granted.

The Columbian Insurance Co., respondents agt. Samuel Stevens and ano. appellant.

Appeal dismissed with costs.

Buford A. Tracy, respondent agt. The First National Bank of Selma, appellant. Joshua T. Blanchard, appellant agt. Hiram P. Trim and another, respondents.

Judgment at General Term reversed and judgment of Special Term affirmed with costs.

Jane F. Baldwin, surviving executrix, &c., appl't agt. Norman Van Dusen, resp't. Thaddeus A. Lawrence, respondent agt. Alfred Ely, appellant.

Theodore B. Gates, appellant agt. Garret V. N. Andrews and another, survivors, &c., respondent.

Judgment affirmed with costs and ten per cent. damages.

Samuel W. Bass and another, respondents agt. Cornelia Comstock et al., administrators, &c., appellants.

Judgment affirmed with costs and five per cent. damages.

Barbara Speiss, adm'x, &c., resp. agt. The New York Central R. R. Co., appl't. Charles A. Baudoine, respondent agt. Henry Hart, imp'd, &c., appellant.

Judgment affirmed with costs.

Stephen Kimpton, respondent agt. Oliver Bronson, appellant (45 Barb. 618.)

Judgment at General Term reversed and judgment on report of referee affirmed, with costs.

John A. Van Blarcom, survivor, &c., appellant agt. The Broadway Bank, respondent (9 Barb. 532).

John B. Dingledin, appellant agt. The Third Avenue Railroad Co., respondent (9 Barb. 79).

Judgment of General Term reversed and judgment of Special Term affirmed, with costs.

James Gibson, assignee, &c. resp't agt. Ogden Haggerty, survivor, &c., appl't.

Judgment affirmed with modification deducting \$90 and interest. No costs to either party. Judgment to be settled by Judge WOODRUFF.

James W. Paige, et al., resp'ts agt. James S. Willett, executor, &c., appl't.

Judgment reversed, new trial ordered, costs to abide the event.

William F. Russel and ano., adm'r, &c., respondent agt. Davis Winne, appellant. Charles L. Beach and others, respondents agt. The Raritan & Delaware Bay Railroad Co., appellants.

Stephen A. Griffin and others, resp'ts agt. William Banks and ano., appl'ts.

Charles K. Bingham, rec'r, &c., resp't agt. Alfred Disbrow et al. appl'ts.

James H. Bacon, respondent agt. Joseph J. Burnham, appellant.

Milo Pratt, appellant agt. Lucien D. Coman, impleaded, &c., respondent.

William Davis, respondent agt. William E. Keyes et al., appellants.

Digest.

Judgment affirmed with modification, without costs of the action to either party. Judgment to be settled by Judge GROVER.

Ellery G. Williams, respondent agt. Daniel H. Fitzhugh et al., ex'rs., &c., appl'ts.

Judgment affirmed, with costs to be paid by the appellants personally.

Theophilus Anthony, executor, respondent agt. Jacob Brouwer, executor, &c., et al., appellants (31 How. 128.)

John R. Gill and others, appl'ts agt. Jacob Brouwer, ex'r, &c., et al., resp'ts.

Judgment reversed, with leave to defendants to answer, in 20 days after Remittitur is sent upon payment of all costs since the Demurrer was interposed.

The Fulton Fire Insurance Co., appellant agt. Charles F. Baldwin, respondent.

Judgment of General Term reversed and judgment ordered for the plaintiff on the verdict, with costs.

Elric L. Nichols, guardian, &c., appl't agt. William W. Sloan and ano., resp'ts.

Judgment affirmed.

Thomas Fitzgerald, plaintiff in error agt. The People, &c., defendants in error.

Judgment of General Term reversed and judgment of Court of Sessions affirmed.

The People, &c., plaintiffs in error agt. Kendall Parker, defendant in error.

Judgment reversed and Assessors ordered to correct the roll by striking out the sum of \$40,000 assessed for 1866.

The People, &c., ex rel. The Glen's Falls Insurance Co., appellants agt. Henry Ferguson et al., assessors, &c., respondents.

Motion to dismiss appeal denied.

Groothman W. Cornell, respondent agt. James T. Dakin, appellant.

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